Supreme Court, U.S.
FILED
OCT 23 2006
OFFICE OF THE CLERK

No. 06-859

IN THE

Supreme Court of the United States

AARON RAISER,
Petitioner,

v.

THE CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS,
BRIGHAM YOUNG UNIVERSITY,
Respondents.

October Term, 2006

Petition for Writ of Certiorari to the

United States Court of Appeals for the Tenth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

1. Whether this Court's holding in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) regarding the preclusive effect of collateral estoppel or in *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326 (1955) regarding Res Judicata makes the discretionary decisions of a judge in a prior case on a collateral matter binding on a similar collateral matter in a second case between the same parties?

2. Whether a plaintiff's Due Process of Law rights under the 5th Amendment or right to access to the federal courts take precedent over Fed. R. Civ. Proc. 10 & 17 and permits a plaintiff in federal court to proceed using a pseudonym where the plaintiff would incur a greater injury than that litigated against by disclosure of the plaintiff's true identity?

3. Whether a trial court judge abused their discretion by allowing a defendant to file a response to a motion to proceed using a pseudonym 6 months late without cause, and hours before the hearing on that motion, which precluded the plaintiff an opportunity to respond, and where the judge then denies any chance to respond to new issues raised in that late response, and then relied on the new issues raised in the response to deny the motion?

4. Whether a Court of Appeals that applies the wrong standard of review can be grounds for vacating that decision where the Petitioner [Appellant in that appeal] otherwise would have prevailed on appeal applying the proper standard of review?

5. Whether Res Judicata can apply where a plaintiff in a prior case had neither opportunity nor reason to challenge a district court's denial of a motion for pseudonym and where after the original motion for pseudonym was denied new facts arose which supported the need for a pseudonym which were not available in the original proceedings for a pseudonym?

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APPENDIX

Appendix A - United States District Court For The District of Utah Order denying Petitioner's Motion for Pseudonym.

Appendix B - United States Court of Appeals for the Tenth Circuit Order affirming Denial of Pseudonym.

Appendix C – Referred to Memorandum of United States District Court For The District of Utah Order denying Petitioner's Motion for Pseudonym.

Appendix D – First Order Collaterally Estopping Second Appeal

Appendix E –Order Denying Rehearing in Lower Court

OPINIONS BELOW

On April 25, 2005 the District Court entered an Order denying Petitioner's *Motion for Pseudonym* in the District Court. (Appendix A).

On May 31, 2005 the Court of Appeal for the Tenth Circuit entered an Order affirming denial of the pseudonym. (Appendix B).

JURISDICTIONAL STATEMENT

The date the order and judgment was entered by the Court of Appeals for he Tenth Circuit was May 31, 2006.

After an extension of time to file a petition for rehearing was granted on June 24, 2006, a petition for rehearing was timely filed on June 27, 2006, which was then denied on July 27, 2006.

This Court's jurisdiction to review, on a writ of certiorari, the decision of the United States Court of Appeals for the Tenth Circuit affirming the Order denying the pseudonym is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. Constitution Amend. V -
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be

taken for public use, without just compensation.

RULES

Utah District Local Rule 7-1(b)(3) Length of Memoranda; Filing Times. Memoranda supporting or opposing all motions, including those under Fed. R. Civ. P. 12(b), except those for or treated as for summary judgment, must not exceed ten (10) pages, exclusive of face sheet, table of contents, statements of issues and facts, and exhibits. A memorandum opposing a motion must be filed within fifteen (15) days after service of the motion or within such extended time as allowed by the court. A reply memorandum may be filed at the discretion of the movant within seven (7) days after service of the memorandum opposing the motion. A reply memorandum must be limited to rebuttal of matters raised in the memorandum opposing the motion and must not exceed ten (10) pages. No additional memoranda will be considered without leave of court. Attorneys may stipulate to shorter briefing periods and fewer memorandum pages, and the court encourages them to do so.

Fed. R. Civ. Proc. 10. Form of Pleadings

(a) Caption; Names of Parties.
Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Fed. R. Civ. Proc. 17. Parties Plaintiff and Defendant; Capacity

(a) Real party in interest.
Every action shall be prosecuted in the name of the real party

in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

STATEMENT OF THE CASE

The underlying case alleged common law claims for breach of privacy and/or fiduciary duty in diversity where an ecclesiastical leader for the Respondent Church of Jesus Christ of Latter-Day Saints (Church), who was also employed by Brigham Young University (BYU), communicated highly sensitive and stigmatizing information concerning Petitioner's alleged psychiatric history - which he had learned in the course and scope of his duties as ecclesiastical leader - to members of BYU's General Counsel who were then involved with Petitioner in a separate litigation.

BYU's General Counsel upon learning of the confidential and stigmatizing information then made a disclosure that Petitioner had a "known ... psychiatric history" in a court filing in a federal civil rights case in which they were then engaged in with Petitioner. That disclosure was based on the information provided to BYU by Petitioner's ecclesiastical leader, which disclosure violated a duty of fiduciary duty

owed to Petitioner. BYU's disclosure however was unsupported by an affidavit or other evidence.

Petitioner later realized that BYU had made the disclosure based on information supplied to them by his ecclesiastical leader and filed a case in diversity in federal court claiming damages for his former ecclesiastical leader's disclosure of the private and confidential information concerning his alleged psychiatric history to members of BYU General Counsel.

The allegation by BYU that Petitioner had an alleged psychiatric history was not generally known to anyone outside of the LDS church and BYU church leadership and was based on a wrongful commitment of Petitioner to a mental intuition some 12 years previous in another state.

In order to pursue the breach of fiduciary duty, Petitioner would of necessity have to make disclosure of his wrongful commitment in his complaint. That a person has been committed to a psychiatric institution is highly stigmatizing. It creates in the listener the strong presumption that the person committed must have some type of mental disorder etc. Further, whether or not the person committed is in fact mentally ill etc. is not easily refuted or disproved. A person with such a highly stigmatizing label is treated differently by society and by their peers. A person with such a label can and would in fact have a difficulty time finding meaningful work as many employers when hiring make background checks on the prospective employee. Where an employer learns someone has a "psychiatric history" or has been committed to a mental institution in makes them less desirable and precludes them from work which they are otherwise capable of performing. Such a label can also affect social relations and other opportunities such as the ability to run for public office.

Petitioner thus sought a pseudonym for his federal court case because he would incur significant harm in making his commitment to a psychiatric hospital public in the court complaint in the case. Petitioner considered the public disclosure so harmful that he sought from the trial court judge in the motion for a pseudonym for permission to withdraw the case from federal court if the pseudonym were not permitted.

The trial court and court of appeals denied the use of a pseudonym.

Petitioner claims that a pseudonym should be allowed because in order to redress the wrong of his ecclesiastical leader breaching the fiduciary duty a far greater injury would far exceed the original injury would occur and that due process of law should mandate an exception to Fed. R. Civ. Proc. 10 & 17 which requires that all cases be litigated in the real name of the plaintiff.

ARGUMENT
REASONS FOR GRANTING THE WRIT

I.

A <u>discretionary decision</u> of a judge in a prior case on a <u>collateral matter</u> can not have the same preclusive effect as Res Judicata on a similar collateral matter in a second case between the same parties.

A.

This Court has held that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979). The issue on appeal is whether the same preclusive effect can be given to a discretionary decision of a judge on a collateral

matter between the same parties. Because a discretionary decision is not one on the merits, and because a judge's discretion can vary on the circumstances and facts of each case, a prior discretionary decision can not ipso facto be binding as res judicata on a similar collateral matter between the same parties in a second case where the causes of action and factual basis for recovery are different.

B.

In December 2003 Petitioner sought a pseudonym in the District Court of Utah in a civil rights case. The pseudonym was sought after the defendant in the case alleged that Petitioner had a "known … psychiatric history" in a court document which was publicly available. That occurred midway into the proceedings of that case. That Petitioner had any type of mental illness of the like was not known to the public in general and the allegation arose from a wrongful commitment of Petitioner to a mental institution some 12 years earlier in Ohio.

Petitioner did not want that information to be publicly available as the stigma surrounding an alleged mental illness is severe both socially, professionally and publicly. Petitioner was however in a difficult predicament. He could not acknowledge that he had been committed to a mental institution in any court filing as that filing would – or could – be made public by the court in those proceedings which would then cause injury to Petitioner.

The original assertion that Petitioner had a psychiatric history was unsupported by any factual evidence and thus inconclusive and therefore the damage limited.

Petitioner in seeking a pseudonym (1) was thus unable to come forward with the necessary showing or evidence for any need of a pseudonym and (2) did not have a high motivation to seek a pseudonym because the assertion that he

did have a psychiatric history was conclusory in nature. Unable to (1) come forward with the evidence to make a strong showing for the need for a pseudonym, (2) and the allegation by the defendant that Petitioner had a psychiatric history being conclusory in nature, both the district court and the court of appeals denied the use of a pseudonym.

It later came to the attention of the Petitioner that the defendant in that court case, Brigham Young University (BYU), had gained access to that information concerning Petitioner's alleged psychiatric history/mental illness through unlawful means. Petitioner was unaware originally that one of his ecclesiastical leaders who worked at BYU informed members of BYU general counsel that Petitioner had been committed to a mental institution in Ohio along with a number of details on the matter.

Petitioner, a resident of California, then filed suit in diversity in federal court in Utah for breach of privacy/fiduciary duty surrounding the disclosure by his ecclesiastical leader to members of BYU general counsel concerning the information about his alleged psychiatric history. The ecclesiastical leader had gained access to that information in the scope and course of his duties as an ecclesiastical leader for the Church of Jesus Christ of Latter-Day Saints (Church) when Petitioner sought to enroll at BYU as a graduate student.

In order to redress the breach of fiduciary duty claim, petitioner would necessarily have to disclose a number of personal details of being committed to a mental institution and sought a pseudonym. Unlike the first case where a pseudonym was sought midway into the proceedings, in the second case, Petitioner was able to file a motion, using a pseudonym, fully disclosing the facts necessary to show the need for a pseudonym at the start of the case.

The District Court denied, without explaining why, the pseudonym based on the decision on the matter in the first

case. The court of appeals likewise denied the pseudonym primarily on the grounds that the issue had previously been decided.

C.

In the instant matter, a pseudonym was denied in a second case based solely on the fact that a pseudonym had been denied in the first case and because it was between the same parties.

The first argument for allowing this petition for writ of certiorari is that Res Judicata should be limited to issues before the court which are decided on the merits, and should not apply to discretionary decisions of a judge on collateral matters of a case. A discretionary decision can vary from the facts and circumstances of each case and thus can not be binding as Res Judicata.

II.

Due Process of Law takes precedent over Fed. R. Civ. Proc. 10 & 17 where a plaintiff would incur a greater injury than that litigated against if the plaintiff's identity were made public.

A second reason for allowing this petition is to resolve the conflict between Fed. R. Civ. Proc. 10 & 17 and the Constitution's mandate of the proper administration of justice under the due process of law clause of the Fifth Amendment.

A.

Fed. R. Civ. Proc. 17 states that a party in interest must proceed using their real name. Fed. R. Civ. Proc. 1 states that the rules, including Rule 17, must be interpreted to ensure a just outcome. Amendment IV of the Bill of Rights states that a citizen is entitled to "due process of law".

In the instant appeal, the Petitioner was unable to overcome Rule 10 & 17's mandate that the litigation be prosecuted in Petitioner's actual name. The requirement's for overcoming Rule 10 & 17 are not listed in either the federal civil procedure rules and case law from the various circuits provide little guidance as to what criteria must be met in order for a litigant to proceed pseudonymously.

The underlying argument for the need of a pseudonym in this petition is that where a litigant shall incur the same, or greater, injury by disclosing the true identity of the plaintiff to the public in order to redress a legal wrong, then whether or not to allow the use of a pseudonym should favor the plaintiff.

While each case where a litigant seeks a pseudonym is going to turn on its own facts, due process of law in must guarantee that a person has access to the courts to redress a wrong. Where the plaintiff is precluded or discouraged from seeking redress of a legal wrong because they would incur a greater injury than that committed against them by the tortfeasor, then due process of law is not being fulfilled.

B.

The increase in the use of pseudonymous litigation appears to have occurred along with the increase in the judicial recognition of the "right to privacy." See *John Doe v. Blue Cross & Blue Shield*, 794 F. Supp. 72, 74 (D.R.I., 1992) (recognizing that this century has experienced a "strong tide" in favor of an individual's right to privacy).

A Rhode Island federal court stated the following concerning the appropriateness of allowing a plaintiff to proceed using a pseudonym:

I find persuasive the analysis of litigants' requests for pseudonymity set forth in Doe v. Rostker, 89 F.R.D. 158 (N.D. Cal. 1981). The Court explained that the general rule

requiring plaintiffs to include the names of all parties in their complaints is not set in stone: Courts have carved out limited exceptions to [this rule] where the parties have strong interests in proceeding anonymously. Although no express standard exists setting forth these exceptions, this court's review of numerous cases has uncovered some classifiable characteristics. The most common instances are cases involving abortion, mental illness, personal safety, homosexuality, transsexuality and illegitimate or abandoned children in welfare cases. The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record.

See *Id.* at 74.

Anonymity should be more readily available in civil trials, because, unlike a fair criminal trial, a fair civil trial is not constitutionally defined as a "public trial," U.S. CONST. Amend VI. Also the anonymous speech doctrine stands for the proposition that an individual should not be impermissibly discouraged from exercising their rights -- most importantly, the right to participate in the political process, which would include the use of the federal court and the right to redress legal wrongs. See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002).

The public right to scrutinize governmental functioning is not so completely impaired by a grant of anonymity to a party as it is by closure of the trial itself. Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them. The assurance of fairness preserved by public presence at a trial is not lost when one party's cause is pursued under a fictitious name. These crucial interests served by open trials are not inevitably compromised by allowing a party to proceed anonymously.

If a member of the public did find a cognizable interest in certain litigation proceeding pseudonymously, that person or persons could seek to intervene or otherwise make the necessary showing to the trial court and find out the true identity of a litigant. The main interest in a civil case is between the litigants themselves and the protection of their interests generally falls upon the litigants.

Appellant maintains that although the public does have an interest in open court proceedings that where the individual privacy interest outweighs the public interest then a pseudonym can be allowed.

As in the many other cases, cases involving mental illness or deficiency at most briefly mention the interests supporting pseudonymity. See e.g. *Doe v. Anrig*, 692 F.2d 800 (1st. Cir. 1982); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981); *Doe v. Colautti*, 592 F.2d 704 (3d Cir. 1979); *Koe v. California*, 573 F.2d 761 (2d Cir. 1978); *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977);

Some cases note the use of fictitious names to protect the plaintiffs' privacy, (Doe v. Lawson, 579 F. Supp. 1314, 1315 n.1 (D. Mass. 1984), aff'd menz., 745 F.2d 43 (1st Cir. 1984) (Parents of a severely retarded child challenged proposed change of his educational placement under the Education of the Handicapped Acts, 20 U.S.C. § § 1401-1461 (1982).); Doe v. Syracuse School Dist., 508 F. Supp. 333 (N.D.N.Y. 1981) (Plaintiff claimed school district failed to hire him as a teacher's assistant and substitute teacher because of his prior mental illness, in violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).); Doe v. Bodwin, 119 Mich. App. 264, 326 N.W.2d 473, 474 (1982)) or to avoid public embarrassment or ridicule. See Suzuki v. Quisenberry, 411 F. Supp. 1113, 1120 (D. Hawaii 1976) (challenge to constitutionality of state mental health law), aff'd in part &

rev'd in part sub nom. Suzuki v. Yven, 617 F.2d 173 (9th Cir. 1980).

In others, the courts recognize the stigma or the adverse economic ramifications of being labeled "mentally ill." See Doe v. Anker, 451 F. Supp. 241, 249-50 (S.D.N.Y. 1978), cert. denied, 446 U.S. 986 (1980) (Tenured teacher sued alleging violation of his constitutional and statutory rights in his placement on involuntary health leave and in the termination of his employment upon a finding that he was unfit to teach by reason of mental illness, schizophrenia, and severe emotional disturbance. The court agreed that plaintiff had been denied a liberty interest in his good name and reputation as a person presumably free from mental disorder, without due process of law.).

In at least one instance, a state court held that when public identification of the plaintiff would jeopardize her emotional stability and continued employment, the court could properly exercise its discretion to grant plaintiffs motion to suppress her name from public disclosure. Doe v. Bodwin, 119 Mich. App. 264, 326 N.W.2d 473 (1982).

In weighing the interests favoring confidentiality, none of the cases suggests that the plaintiffs had failed to keep confidential their status as mentally ill persons. Assuming that confidentiality had been maintained, the next question is the substantiality of the bases for nondisclosure of their names. Obviously, public disclosure of a person's mental illness, emotional problems, or intellectual deficiencies often would be humiliating. See, e.g., Lora v. Board of Educ., 74 F.R.D. 565, 571 (E.D.N.Y. 1977). Society's respect for privacy in this realm is manifested in the widespread recognition of a psychotherapist-patient privilege. See C. McCORMICK, EVIDENCE § 98 (3d ed. 1984).

It is equally true that the mentally ill or deficient are

stigmatized. See, e.g., Parham v. J.R., 442 U.S. 584, 601 (1979) ("what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness"); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (a victim of debilitating mental illness not free of stigma); *Johnson v. Solomon*, 484 F. Supp. 278, 284 n.4, 287 (D. Md. 1979) (Stigmatization can arise from involuntary commitment to a mental hospital.); *Institutionalized Juveniles v. Secretary of Pub. Welfare,* 459 F. Supp. 30, 39 (E.D. Pa. 1978) ("stigma attaches to institutional commitment whether the juvenile is classified as mentally ill or mentally retarded" (footnotes omitted)), rev'd on other grounds, 442 U.S. 640 (1979); *Stamus v. Leonhardt,* 414 F. Supp. 439, 449 (S.D. Iowa 1976) ("the legal and social consequences of commitment constitute a stigma of mental illness which can be as debilitating as that of criminal conviction" (citations omitted)). See generally Gove & Fain, The Stigma of Mental Hospitalization, 28 ARCHIVES OF GEN. PSYCHIATRY 494 (1973); Schwartz, Myers, & Astrachan, Psychiatric Labeling and the Rehabilitation of the Mental Patient, 31 ARCHIVES OF GEN. PSYCHIATRY 329 (1974).

There is a considerable public interest in maintaining the confidentiality of these litigants' identities, for preventing such stigma is in the public interest as well as the litigants' private interest. Moreover, name protection may be essential to avoid deterring the allegedly mentally ill or deficient, or their families, from suing to vindicate established rights or to establish new rights. Name protection also may be a factor in encouraging *26 the mentally ill and deficient to seek and participate fully in treatments and programs intended for their benefit. See, e.g., *Doe v. Anker*, 451 F. Supp. 241 (S.D.N.Y. 1978); Doe v. Bodwin, 119 Mich. App. 264, 326 N.W.2d 473 (1982).

Pseudonym in treatment-related litigation would be part of the larger confidentiality surrounding treatment programs.

Finally, it often would not be in the public interest for these plaintiffs to drop their lawsuits in order to preserve their privacy, for the challenges they bring benefit society at large. If emotionally disturbed or retarded children are not educated, all society loses from their lessened abilities; if committed persons are given only custodial care and not treatment, all society loses from their lessened ability to work and to contribute.

C.

As can be seen from the cited cases, other circuits allow a pseudonym where a litigant's mental illness or alleged mental illness is part of the case in order to avoid social stigma, harm to one's employment or public stigma.

An examination of other federal cases where disclosure of a litigant's psychiatric history or mental health status shows that such cases generally allow a pseudonym. Some examples:

Doe v. Bolton, 410 U.S. 179 (1973) - pseudonym allowed where a woman alleged that her condition of poverty and of being abandoned by her husband as well as being a psychiatric patient rendered her to be unable to care for or support the new child.
Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) - pseudonym allowed for a psychiatric patient who sought class action status, requesting a preliminary injunction to force defendant government agencies to pay for care in a private mental institution.)
Woe v. Cuomo, 638 F. Supp. 1506 (D.N.Y., 1986) rev'd, 729 F.2d 96 (2d Cir.), cert. denied, 105 S. Ct. 339 (1984) - pseudonym allowed for Plaintiff psychiatric patients who brought an action against defendant governor, defendant doctor, defendant commissioner, and defendant hospital

alleging constitutional violations related to their right to adequate treatment.

Doe v. Anker, 451 F. Supp. 241 (D.N.Y., 1978) - pseudonym allowed for a former school teacher brought an action against school officials where the teacher was placed on involuntary health leave for alleged psychiatric related problems.

Legion v. Richardson, 354 F. Supp. 456 (D.N.Y., 1973) (Legion being the pseudonym) - pseudonym allowed for mental patients bringing suit regarding Medicaid benefits.

L.C. by Zimring v. Olmstead, 138 F.3d 893 (11th Cir. 1981)- pseudonym allowed for mental health patients who were residing in a state psychiatric hospital.

Prudential Ins. Co. of Am. v. Doe, 76 F.3d 206 (8th Cir., 1996) - pseudonym allowed for plaintiff(s) seeking insurance coverage payments for hospitalization involving psychiatric disorders. See also *PAS v. Travelers Ins. Co.*, 7 F.3d 349 (3d Cir., 1993); *Doe v. Travelers Ins. Co.*, 167 F.3d 53 (1st Cir., 1999).

In *John Doe v. Fellows*, No. 89-15869 (CA-9, March 5, 1991) the Ninth Circuit vacated the district court's denial of a pseudonym in a civil rights case where the plaintiff alleged being unlawfully taken by police for psychiatric evaluation. On appeal, the court vacated the district court's order and remanded for a determination as to whether an action under pseudonym was appropriate. The court held that because appellant's case involved his detention for psychiatric evaluation, he might have had a legitimate interest in protecting his privacy by proceeding under a pseudonym.

In *Anonymous v. Legal Servs. Corp.*, 932 F. Supp. 49 (D.P.R., 1996) the defendants asserted that the employee's use of a pseudonym was contrary to the terms of Fed. R. Civ. P. 10(a). The court disagreed because the employee's allegations involved a treatable mental illness and given his vocation as an attorney, his privacy interest was sufficient to proceed anonymously.

Others cases allowing pseudonymity for alleged mental illness are *Doe v. Harris*, 495 F. Supp. 1161 (S.D.N.Y.1980); *Doe v. Anrig*, 692 F.2d 800 (1st. Cir. 1982); Doe v. New York Univ., 666 F.2d 761 (2d Cir. 1981); Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), cert. denied, 451 U.S. 993 (1981); Koe v. California, 573 F.2d 761 (2d Cir. 1978); Doe v. Hampton, 566 F.2d 265 (D.C. Cir. 1977); Anonymous v. Anonymous, 558 F.2d 677 (2d Cir. 1977); Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979); Doe v. Gallinot, 486 F. Supp. 983 (C.D. Cal. 1979), aff'd, 657 F.2d 1017 (9th Cir. 1981); Doe v. Lally, 467 F. Supp. 1339 (D. Md. 1979); Woe v. Mathews, 408 F. Supp. 419 (E.D.N.Y. 1976), aff'd mem. sub nom. Woe v. Weinberger, 562 F.2d 40 (2d Cir. 1977), cert. denied, 434 U.S. 1048 (1978).

D.

While most of the Circuits favor the use of a pseudonym in a federal court case where a litigant's alleged mental illness is at issue in the case, the Tenth Circuit is an exception.

At a minimum, the 1st 2nd 3rd 5th 8th 9th 11th D.C. circuits and additionally a District Court in the 4th circuit allow for a pseudonym where a plaintiff's alleged mental illness is at issue in the case. Most of the time it is to prevent injury to the parties employment or professional reputation or to avoid social stigma.

E.

While most circuits tend to favor a balancing test, what to balance and what weight to give the various criteria is very open and inconsistent.

While each case where a pseudonym is requested is going to turn on its own facts, Petitioner suggests that where a litigant shows that they shall incur the same or greater injury in order

to redress a legal wrong committed against them if their identity is made public, then the granting of a pseudonym should be favored.

No federal statute prohibits the use of a pseudonym. The Constitution does not appear to forbid it. While Rules 10 and 17 of the civil procedure rules require the use of a parties actual name in interest it appears that the main reason for that requirement was to prevent the same party suing a defendant multiple times under a different name.

In the instant case, both the district court and the defendant in the district court were given formal notice of the true identity of the Petitioner/Plaintiff so the need for requiring the actual name in interest is limited in that respect. As for the public interest, a general reason for openness in the courts is to ensure some degree of fairness and so the public can scrutinize the proceedings. In this case, if a pseudonym were allowed the court proceedings are still public, only the identity of the plaintiff would be withheld from the public. Lastly, for the very limited times a non-party to the case did have a compelling interest in the identity of a pseudonymous litigant, they could seek to intervene in a case or make some strong showing of a need or purpose to the trial court as to why they should be given access to their true identity.

Here, Petitioner adequately argued the harm to his career, getting employment, difficulty with elected public service employment and social injury would result in order to redress the wrong committed by his ecclesiastical leader breaching his fiduciary duty and disclosing Petitioner's commitment to a mental institution and accompanying facts to members of BYU general counsel.

If a pseudonym can not be allowed in a case as this, then the Petitioner and other similarly situated must incur an injury twice. Once when the breach of fiduciary duty occurs and the highly stigmatizing and damaging information is

communicated in violation of that duty, and then a second time when the issue is litigated in court and the proceedings and actual identity of the plaintiff are made public.

The primary mission of the federal courts is to provide a citizen or citizens a forum to redress legal wrongs. The public's need to scrutinize those proceedings is secondary. Because Petitioner and other similarly situated litigants would be effectively denied access to the courts or at least discouraged for using the courts to redress wrongs committed against them, due process of law should allow for a greater use of a pseudonym in fact scenarios as this case. The court and the defendant would be aware of the Petitioner's true identity and the public could still scrutinize and evaluate the performance of the judiciary in resolving the issues.

III.

Whether to permit a pseudonym is entrusted to the trial court's discretion; a trial court judge abuses their discretion by relying on new issues raised in a Response to a motion without allowing a Reply by the other party to present argument to counter the new issues raised.

A third basis for granting this petition is that due process of law should required a District Court judge to hear both sides of an argument prior to making a discretionary decision having a material impact on the rights of the parties. In the instant matter the trial court abused its discretion when it issued a decision denying the use of a pseudonym prior to hearing full argument of the issues.

In the instant matter, Petitioner filed a Motion for a Pseudonym in September, 2002. Local Rule requires that the Response be filed within 15 days of that motions. (District of Utah Local Rule 7-1(c)(3)). This court has stated that the Local Rules of a District Court are the laws of the United States. See *Weil v. Neary*, 278 U.S. 160, 169 (1929).

In the instant matter, respondent Church, for no explained reason, filed their Response 6 months (1/2 year) after the Motion for Pseudonym was filed. In fact it was filed only hours before oral argument on the matter. BYU on the other hand, without explanation, filed their Response the day after the oral argument hearing. Upon learning at the hearing that Church had filed a Response, the judge deferred oral argument and stated it would be decided on the pleadings, but then the next day decided the motion without giving Petitioner any chance to address new matters raised by both parties which the trial court judge wholly relied on to deny the pseudonym.

Where a trial court judge does not follow proper procedures when exercising their discretion such wholly relying on new arguments raised in a response to a motion without first hearing the other parties reply, due process of law mandates a finding of abuse of discretion absent highly unusual circumstances, not present in this appeal.

IV.

Where a Court of Appeals applies the wrong standard of review, that decision must be vacated where the appellant otherwise would have prevailed on appeal had the proper standard of review been applied.

With respect to a trial court's abuse of discretion, where the court of appeals applies the wrong standard of review, their upholding of a trial court's discretionary decision should be vacated on due process of law grounds absent compelling circumstances.

In the instant appeal, the Tenth Circuit reviewed the trial court judge's decision denying a pseudonym de novo. While the merits of that de novo review are addressed in the section that follows, applicable case law of the Tenth Circuit mandated that the trial court judge abused their discretion and

had that standard of review been applied, the trial court's decision would have been vacated. In fact the Court of Appeals never mentions anything about abuse of discretion in its option, yet that is the standard of review.

The Tenth Circuit states that where a trial court judge does not follow proper procedures when deciding matter entrusted to their discretion – at least in the context of awarding attorney fees - then an abuse of discretion is found. See *Daiflon v. Bohanon*, 612 F.2d 1249 (1979). ("An abuse of discretion occurs if the judge fails to apply the proper legal standard or to follow proper procedures in making the determination or bases an award [or a denial] upon findings of fact that are clearly erroneous.") It would logically follow that in most every context where proper procedures are not followed in how the judge arrives at a discretionary decision that an abuse of discretion is generally found.

In the instant matter, the trial judge waived the local rule requiring a response to be filed within 15 days, instead allowing, with no reason whatsoever, the response to be filed some 6 months late. Additionally, the defendants filed that response hours prior to the hearing. That procedural tactic by the defendants, waiting until hours before the hearing, was an intentional act which precluded the Petitioner any chance to read and reply to the response prior to the hearing. Most judges would strike the response on that ground alone. It sets a dangerous precedent for a judge to allow a defendant to wait until hours prior to decision on an issue to submit their response, intentionally waiting ½ year to do so, and allowing the defendant to profit from that maneuver by denying the Petitioner a chance to reply to that response, where new issues were raised, and relied on by the judge in ruling against Petitioner.

Thus the trial court clearly abused its discretion and had the Tenth Circuit applied the proper standard of review, its order denying the pseudonym would have been vacated. But

instead the Tenth Circuit did a de novo review, more or less, and concluded that – in their opinion – a pseudonym should be denied. However, it is not the Tenth Circuit court's discretion that counts, it is the trial judge.

While the Tenth Circuit's basis for denying the pseudonym is completely refuted below, the proper standard of review must be followed and had it been, the trial court would have been required to hear both sides of the argument and then issue a decision, then after the issues are completely developed and argued in the trial court, then the court of appeals would be in a position to examine the reasoning and arguments and evidence before the trial court to make a determination as to whether an abuse of discretion occurred.

Unless the trial court's decision exceeded the bounds of reasonableness and as long as it followed proper procedures, the court of appeals must uphold the discretionary ruling; though the court of appeal may or may not agree with it. Here the court of appeals simply said in their opinion denial of the pseudonym was proper based on their de novo review. Yet their de novo review is not what counts. Whether they agree or disagree with the trial judge does not count. What counts is that (1) the trial court followed correct procedure and (2) its decision did not exceed the bounds of reasonableness.

In the appeal in the lower court, the Tenth Circuit examined (2) and found they agreed with the district court, however they never made any finding that the trial judge followed correct procedures. Therefore the Tenth Circuit's order upholding denial of a pseudonym must be vacated and the matter remanded to the trial judge to hear both sided of the issue prior to making a decision on the matter.

V.

Res Judicata can not apply where a plaintiff in a prior case had neither opportunity nor reason to challenge a district court's denial of a motion for pseudonym and where after the original motion for pseudonym was denied new facts arose which supported the need for a pseudonym which were not available in the original proceedings for a pseudonym.

A. Necessary Factual Background

The low court denied the pseudonym mainly – and incorrectly - on the grounds that the issue had been decided in a previous case. In that previous appeal Petitioner had neither the opportunity or incentive to fully challenge denial of the pseudonym. Further, new facts came to light in the present appeal which were not available in the original motion for a pseudonym.

Petitioner was litigating a civil rights case in federal court regarding conduct of their police. That case was filed in September, 2002. In December 2002, BYU made the allegation - in a motion to dismiss - the case that Petitioner had a "known … psychiatric history". BYU did not support that allegation with any affidavits or other supporting evidence.

Petitioner does not have what would be understood as a psychiatric history. He was wrongfully committed to a mental institution in Ohio for a number of months. That was in 1991. A number of factors combined to effectuate the wrongful commitment such as a near complete denial of due process of law. In one commitment proceeding for example, Petitioner was denied by the psychiatric nurse - for no reason - permission to leave his ward to go the commitment hearing. Three days previous, the same nurse denied Petitioner a chance to meet with his attorney to prepare for the hearing.

In fact, petitioner never did meet his attorney who was to represent him. Not being able to attend the hearing, Petitioner was committed for a one year period of time.

The Petitioner realized he was going to be committed there long term which did not appeal to him, and was able to escape and went to another state. Petitioner had graduated a few years earlier from college in Utah and returned there, went back to college, got a decent job and basically has lived relatively happily ever after. Petitioner had never told anyone that he had ever been committed to a mental institution and it was not generally know to anyone that it had happened, outside Petitioner's immediate family and a few person at his church in Ohio.

However, when attempting to reapply to BYU as a graduate student, Petitioner's ecclesiastical leader, Eugene Bramhall, found out from Petitioner had in fact been committed to a mental institution. Eugene Bramhall also happened to be the General Counsel to BYU. In 1997, Eugene Bramhall communicated to another member of General Counsel that Petitioner had been committed to a mental institution. In 2000 Eugene Bramhall retired from BYU.

In September 2002, Petitioner had filed a civil rights suit against BYU in federal court regarding a number of alleged violations of his civil rights by the BYU police. At that time, Petitioner was unaware that anyone at BYU was aware that Petitioner had been committed to a mental institution.

In December, 2002, BYU by and through their general counsel revealed that Petitioner had a "known ... psychiatric history". That was disclosed in a motion to dismiss the case. Petitioner was taken aback by that statement and was not happy about it because it was publicly available in the court proceedings, because it was highly misleading, and because a tremendous amount of stigma surrounds the label of having a psychiatric history.

Petitioner never addressed to accuracy of BYU's allegation. First, the allegation was made in a motion to dismiss which only looked to the complaint and not to outside allegations or innuendo about the competency of the plaintiff. Second, plaintiff realized that whether he had a psychiatric history was not material to any cause of action. Plaintiff then did not address BYU's allegation as a result. An additional factor weighed in favor of not addressing BYU's allegation and that was in order to correct or properly address the allegation, Petitioner would have had to disclose that he had been committed to a mental institution some 11 years earlier which Petitioner did not want to do.

BYU did not support their allegation that Petitioner had a psychiatric history with any alleged factual foundation and had not other evidence to support that premise. Because the reader had no factual basis to believe the truthfulness of BYU's assertion about Petitioner, Petitioner felt it was better left uncorrected.

Petitioner was unaware how BYU came into possession of that information at that time. Petitioner was unsure how to proceed at that point and decided to file a motion to simply seal BYU's motion to dismiss so that the information about Petitioner would not be made public. However, the trial judge denied that motion.

Petitioner attempted to ignore the matter but felt uneasy about that information being publicly available. In December, 2003 Petitioner filed a motion to proceed with a pseudonym resulting from BYU's disclosure that Petitioner in this appeal had a "known … psychiatric history".

Petitioner was in an awkward predicament. While he wanted a pseudonym, he was unable to acknowledge that he had ever been in a mental institution because he would have to acknowledge that in a public court proceeding. Petitioner did not want to risk that. Petitioner was familiar enough with

the judge and believed if Petitioner did bring up the fact he had been committed to a mental institution, which he would have to in order to adequately argue a need for a pseudonym, she would make it public and allow the information to be public. Noted is that case was being litigated in Utah Federal District Court and Petitioner was living in California and could not afford legal representation or to travel to Utah to appear in person before the judge.

While Petitioner wanted a pseudonym, he preferred living with BYU's unsupported allegation that he had a psychiatric history than to disclose that he had been committed to a mental hospital himself. Thus, Petitioner could not adequately show the court the need for a pseudonym without disclosing damaging information, which information would be made public.

Not being able to come forth with an adequate basis for a pseudonym, and further being unaware that BYU had obtained that information unlawfully, Petitioner's request for a pseudonym was denied. It was further denied on appeal. The Tenth Circuit basically stated that the reason it was denied was because Petitioner had not come forward with a sufficient need showing a pseudonym was deserved. The actual holding of that opinion was that when a litigant seeks a pseudonym midway into a court proceeding and does not come forward with adequate argument for a need for that pseudonym, it would be denied. Further, because BYU did not come forward with anything but an unsupported allegation in a court pleading that basically alluded to Petitioner having a psychiatric history, that factored into the need for a pseudonym. It very well could have been that BYU misspoke or misrepresented the facts etc. At that time Petitioner had no awareness or evidence that BYU had obtained the information about Petitioner's alleged psychiatric history unlawfully from Petitioner's ecclesiastical leader when he worked for BYU.

Given that along with the fact that BYU had no factual support for their allegation that Petitioner had a psychiatric history, the Tenth Circuit's ruling was not far out of line.

After some research and reviewing Petitioner's records, he became suspicious that General Counsel had learned that Petitioner had been committed to a psychiatric institution from Eugene Bramhall. On September 23, 2004 Petitioner then filed a suit in diversity for breach of privacy/fiduciary duty concerning the disclosure by Eugene Bramhall to BYU General Counsel that Petitioner had been committed to a mental institution. Petitioner did not have any solid evidence of that communication other than highly circumstantial evidence that his ecclesiastical leader was the actual source. By a process of elimination Petitioner concluded that he was the likely source.

However, in order to adequately redress to breach, Petitioner would have to acknowledge that he had in fact been committed to a mental institution. Petitioner was uneasy with making that disclosure as it would be the first time he had ever done that anywhere. Court procedures allowed for the initial motion for pseudonym to be filed using a pseudonym without revealing the true identity of the plaintiff until the motion were ruled on.

Petitioner asked, in that motion, to be given a chance to withdraw the case from federal court had the pseudonym been denied because the injury inflicted on Petitioner would be equal to, or exceed, the harm caused by the breach of fiduciary duty.

Local Rules required that the response to the motion for pseudonym be filed within 15 days. However, no response was filed for 6 months. Then hours before the hearing on the pseudonym, Church filed a response objecting to the use of a pseudonym. BYU filed a response the next day. For the first time, BYU argued that the denial of the pseudonym in

the first case was res judicata. The next day, without giving Petitioner a chance to show that res judicata was not a bar to the pseudonym, the court denied the pseudonym and would not allow Petitioner a chance to withdraw his case.

Denial of the pseudonym was upheld by the Tenth Circuit on the grounds that the original denial of the pseudonym barred a second petition for a pseudonym.

Where a defendant by unlawful means obtains highly personal and stigmatizing information about a plaintiff and then discloses that unlawfully acquired information in a federal court case proceeding, a pseudonym can be allowed to protect the plaintiff from the resulting injury

B. Rule of Law – Res Judicata – New Facts/Motivation

"Whether two cases implicate the same cause of action turns on whether they share the same 'nucleus of facts.' " Drake, 291 F.3d at 66 (quoting Page v. United States, 729 F.2d 818, 820 (D.C.Cir.1984)). In pursuing this inquiry, the court will consider " 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co., 723 F.2d 944, 949 n. 5 (D.C.Cir.1983) (quoting 1B J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.410[1] (2d ed.1983)).

See *Apotex, Inc. v. Food & Drug Admin.*, 393 F.3d 210 (9th Cir. 2004).

Where new facts are present in the second action not available in the first, Res Judicata is found not to apply.

… the District Court's conclusion that Drake should, or could, have raised these claims in FAA I was misguided. Res judicata does not preclude claims based on facts not yet in

existence at the time of the original action.

See *Drake v. F.A.A.*, 291 F.3d 59, 66- 67 (D.C. Cir. 2002)

C. Analysis

In the instant matter, Petitioner did not have the motivation to fully litigate the issue of whether he deserved a pseudonym in the first case, and also did not have the same facts to support that need.

Because the only disclosure regarding his alleged psychiatric history was by the defendant in a court filing which was unsupported by any factual evidence, the Petitioner did not have the same need for a pseudonym as in the second case where it was the Petitioner who would necessarily have to disclose that he had been committed to a mental institution. There is a material difference between a bare allegation that someone has a psychiatric history and that same person making an admission that they were committed to a mental institution. With a bare allegation, unsupported by facts, the reader might conclude that the allegations was wrong or inconclusive. With a party admission it serves as an absolute truth that it happened. The resulting injury as far as social stigma, professional harm and public perception is far greater in the latter case.

Second, new facts supporting the need for a pseudonym were present in motion for a pseudonym in the second case which were not available in the first. For example, in the second case Petitioner presented facts/allegations to the court that his former ecclesiastical leader had breached a fiduciary duty in disclosing that Petitioner had been committed years earlier to a mental intuition. Thus that new fact provided a compelling reason to allow a pseudonym as in order to redress that breach, Petitioner would have go suffer the same, or greater injury, if he were required to litigate in his actual name.

CONCLUSION

The writ of certiorari should be allowed on the grounds that a discretionary decision on a collateral matter can not be binding under collateral estoppel or res judicata on a similar collateral issue between the same parties.

Additionally, due process of law should favor allowing a pseudonym where the plaintiff faces a greater injury by litigating a case in federal court under their actual name, and the litigant's due process of law rights should take precedence of Fed. R. Civ. Proc. 17 and 10.
Additionally, due process of law is not fulfilled where a trial judge issues a discretionary ruling on a matter affecting the rights of the parties without hearing both sides of the issue first.

Additionally, a decision of a court of appeals which applied the incorrect standard of review should be vacated on due process of law grounds where the litigant would have otherwise prevailed on appeal had the proper standard of review been applied.

Additionally, where a plaintiff does not have the same opportunity, motivation or factual basis when seeking a decision from a federal court judge, a ruling against the plaintiff can not be res judicata or collaterally estop that plaintiff from seeking a ruling on the same or similar issue in a second federal court case where new motivation, facts and opportunity present itself to show the judge that the relief sought should be given.

The relief sought is that the original order denying a pseudonym be vacated and re-heard in the trial court with full opportunity to present argument on the motion for a

pseudonym based on the outcome of this appeal.

Respectfully Submitted,

s/_____

Aaron Raiser

Appendix A - United States District Court For The District of Utah Order denying Petitioner's Motion for Pseudonym.

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

ORDER
Case No. 2:04 CV 896 TC

For the reasons set forth in defendant Brigham Young University's Memorandum in Opposition to Plaintiffs Motion for Pseudonym,
IT IS HEREBY ORDERED that plaintiffs Motion for Pseudonym is DENIED.

DATED this 2 day of April, 2005.
BY THE COURT:

TENA CAMPBELL
CENTRAL DIVISION
United States District Judge

Appendix B - United States Court of Appeals for the Tenth Circuit Order affirming Denial of Pseudonym. (See Petition for needed factual correction of the Order)

United States Court of Appeals,
Tenth Circuit.

Aaron RAISER, also known as T.G.,
Plaintiff-Appellant,
v.
CHURCH OF JESUS CHRIST
OF LATTER-DAY SAINTS;
Brigham Young
University,
Defendants-Appellees.
No. 05-4120.
May 31, 2006.

CARLOS F. LUCERO, Circuit Judge.
Aaron Raiser, a plaintiff appearing pro se, brings this interlocutory appeal challenging district court orders (1) denying his motion to proceed under a pseudonym and (2) limiting pretrial discovery. We exercise our jurisdiction under 28 U.S.C. § 1291 and AFFIRM in part and DISMISS in part.

In 2002, Raiser filed a lawsuit against Brigham Young University ("BYU") and the City of Provo, Utah, alleging that during his interactions with BYU security and the Provo Police Department his civil rights were violated. ("Raiser I "). In its Motion to Dismiss, BYU made reference to Raiser's psychiatric history. Raiser moved to seal the record and moved to proceed under a pseudonym. Both of those motions were denied. Raiser appealed only the district court's denial of his motion to proceed using a pseudonym, and we affirmed, holding that Raiser had not demonstrated exceptional circumstances justifying his use of a pseudonym.

Raiser v. Brigham Young Univ., 127 Fed.Appx. 409, 411 (10th Cir.2005) (unpublished). [FN1]

FN1. As noted in Raiser I, this court has jurisdiction over an interlocutory order denying a motion to proceed under a pseudonym under the collateral order doctrine. Raiser, 127 Fed.Appx. at 410 (citing Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1066 (9th Cir.2000); James v. Jacobson, 6 F.3d 233, 237-38 (4th Cir.1993); S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712 (5th Cir.1979)).

In 2004, Raiser, now acting under the pseudonym T.G., filed a civil complaint against both BYU and The Church of Jesus Christ of Latter-Day Saints (the "Church") alleging claims based on BYU's reference to his mental history in its motion during the 2002 litigation. ("Raiser II "). Contemporaneously, he filed a motion for permission to proceed in this case under a pseudonym. The district court denied the motion, and two motions for reconsideration. Raiser appeals.

We review a district court's denial of a motion to proceed under a pseudonym for abuse of discretion. M.M. v. Zavaras, 139 F.3d 798, 802 (10th Cir.1998). As we have noted previously, there is a substantial benefit to maintaining open court proceedings, and thus the public has an interest in knowing the identity of litigants. Femedeer v. Haun, 227 F.3d 1244, 1246 (10th Cir.2000).

Accordingly, the Federal Rules of Civil Procedure mandate that the real names of all real parties in interest must be used in complaints. See Fed.R.Civ.P. 10(a) and 17(a).

Nonetheless, even though there is no explicit congressional grant of a right of a party to proceed anonymously, we have recognized that there is also a public benefit in allowing some litigants to proceed anonymously. Femedeer, 227 F.3d

at 1246. Our case law has thus recognized that in certain "exceptional circumstances" the need for anonymity outweighs the presumption in favor of open court proceedings. Id. Exceptional circumstances exist if the case involves matters of a "highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the Raiser's identity." Id. (quotation omitted).

[1] In cases where the sensitive information has already been disclosed during a party's prior litigation under its real name, the social interest in allowing a party to proceed anonymously is limited. See M.M. v. W. Zavaras, 139 F.3d 798, 802 (10th Cir.1998). Placing this matter in context, the issue brought to us for our consideration has been previously considered and ruled upon in Raiser I. In the earlier case, substantially similar assertions regarding the use of a pseudonym had been raised to a panel of this court, and denied. The consequence of that denial is that Raiser's name remained in the public domain in connection with the litigation. To paraphrase the present situation, *812 Raiser's request is equivalent to asking us to put jack back in the box, that is, to collaterally review a previous decision of this court. That we cannot do. Raiser has not demonstrated sufficient "exceptional circumstances" justifying his use of a pseudonym in this proceeding. [FN2]

FN2. Raiser argues that this case is distinguishable from his prior proceedings because if we denied his motion to proceed under a pseudonym he would incur the very injury against which he is litigating. We reject this argument. Preventing disclosure of his identity is not the basis of Raiser's lawsuit. Instead, he seeks monetary compensation for a disclosure that has already occurred.

[2] Raiser also argues that the district court abused its

discretion by denying his motion to proceed using a pseudonym because (1) the defendants' responses to his motion were untimely, and (2) he was not afforded any opportunity to file a reply under local rule DUCivR 7-1(b)(3) to those responses before his motion was denied. Although Raiser is correct that he could file a reply, he could do so only if the reply memorandum is "limited to rebuttal of matters raised in the memorandum opposing the motion." A reply may not properly be used to raise new arguments in support of a party's position. Having failed to demonstrate in his initial brief that his case is sufficiently "exceptional," disposition of this issue is not relevant on appeal.

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[3] Raiser's second issue on appeal, that the district court erred in entering a pre-trial discovery order limiting both the scope of Raiser's written discovery requests and the number and manner of his witness depositions, is dismissed. Pretrial discovery orders are generally non-final, interlocutory orders that may not be appealed until a final order is entered in the proceeding. See FTC v. Alaska Land Leasing, Inc., 778 F.2d 577, 578 (10th Cir.1985) (citing 28 U.S.C. § 1292). Because exception to that rule is not present, this court lacks jurisdiction to address the issue.

Raiser's motion to proceed in forma pauperis is GRANTED. The district court's April 22, 2005 order denying Raiser's motion to proceed under a pseudonym is AFFIRMED. Raiser's appeal of the district court's April 26, 2005 order is DISMISSED.

Appendix C – Referred to Memorandum of United States District Court For The District of Utah Order denying Petitioner's Motion for Pseudonym.

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH

T.G.
Plaintiff(s),
vs.
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and BRIGHAM YOUNG UNIVERSITY,
Defendant(s),

OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM

Defendant Brigham Young University ("BYU"), by and through its counsel, hereby joins in The Church of Jesus Christ of Latter-Day Saints' (the "Church") Memorandum in Opposition to Plaintiffs Motion for Pseudonym (the "Church's Memorandum") filed by Church on or about April 19, 2005 and adds the following additional argument.

ARGUMENT

Plaintiff desires to pursue his claims under the cover of anonymity and has, to date, identified himself as TG. However, as correctly articulated by this Court in a hearing on various pending motions held on April 19, 2005, Plaintiff has not obtained this Court's permission to proceed under a pseudonym.

While some courts have taken the position that an action filed under pseudonym is null and void per se, Doe v. United States Department of Justice, 93 F.R.D. 483, 484 (D. Cob. 1982) (holding that a "civil action has not been commenced

and it will not be commenced unless and until . . . the title of the action shall include the names of all the parties"), the 10th Circuit has recognized a narrow exception for cases involving "matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiffs identity." M.M v. Zavaras, 139 F.3d 798, 803 (10th Cir. 1998) (additional citations omitted). Regardless, to BYU's counsel's knowledge, no case provides the inherent right for a plaintiff to proceed anonymously without a court order. Certainly, Plaintiff has not cited to any such case nor can he point to any court order that authorizes his efforts to proceed as an anonymous litigant.

Furthermore, the recent decision by the 1 0th Circuit Court of Appeals in Raiser v. Brigham Young University, No. 04-4025, a copy of which is attached as Exhibit "A", is dispositive of Plaintiffs Motion. Plaintiff cannot point to any facts or circumstances which materially distinguish his Motion here with the virtually similar motion sought in the Raiser case which was denied by this Court and recently affirmed, on an interlocutory basis, by the 1 0th Circuit Court of Appeals.

BYU respectfully submits that Plaintiff is not entitled to proceed under a pseudonym. His Motion should therefore be denied with an order that further requires Plaintiff to forthwith file an appearance in his own name.

DATED this 20th day of April, 2005.
BENNETT TUELLER JOHNSON & DEERE
Daniel L. Steele
Attorneys for Defendant
Brigham Young University

FN1 In the hearing of April 19, 2005, the Court correctly denied Plaintiffs Motion for Sanctions wherein Plaintiff argued that the Church's reference to other legal proceedings

filed by Plaintiff, including one other pending matter now before this very Court, breached his privacy by revealing his true identity. In denying Plaintiffs Motion for Sanctions, the Court properly noted that Plaintiff does not have a vested privacy right in his usc of a psuedonym because he does not have the Court's permission to proceed under the cover of a psuedonym.

Appendix D – Order in the Initial Denial of Pseudonym

United States Court of Appeals,
Tenth Circuit.
Aaron RAISER, Plaintiff-Appellant,
v.
BRIGHAM YOUNG UNIVERSITY, Defendant-Appellee,
and
The City of Provo, Defendant.
No. 04-4025.
March 29, 2005

PORFILIO, Circuit Judge.
After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.
[1] Plaintiff Aaron Raiser, appearing pro se, appeals the district court's interlocutory order denying his motion to proceed under a pseudonym in his civil rights complaint against defendant Brigham Young University ("BYU"). We entered a show-cause order directing the parties to address the appealability of the district court's order, because only final orders are appealable as of right, and, in general, an order is not final unless it disposes of all remaining claims. See Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, 1263 (10th Cir.), cert. denied, 540 U.S. 820, 124 S.Ct. 103, 157 L.Ed.2d 38 (2003). We conclude that this court does have jurisdiction to review the district court's order denying plaintiff anonymity pursuant to the collateral order doctrine.
To be appealable under the collateral order doctrine, a district court decision "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable

on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); see also Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). We are satisfied that the district court's denial of plaintiff's motion to proceed under a pseudonym meets all three of these requirements. See Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1066 (9th Cir.2000) (holding that order dismissing action for failure to include plaintiffs' names but giving leave to amend complaint is immediately appealable under collateral order doctrine); James v. Jacobson, 6 F.3d 233, 237-38 (4th Cir.1993) (order prohibiting plaintiffs from testifying anonymously at trial is immediately appealable under collateral order doctrine); Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe, 599 F.2d 707, 712 (5th Cir.1979) (order requiring plaintiffs' identities be disclosed is appealable under the collateral order doctrine). The district court conclusively denied the motion both initially and on reconsideration; the question of whether plaintiff may proceed under a fictitious name is separate from the civil rights claims he is asserting in his complaint; and the order is essentially unreviewable on appeal because any right to proceed anonymously will be lost if not permitted before trial. See Does I Thru XXIII, 214 F.3d at 1066.

Plaintiff filed a civil rights complaint against BYU and another defendant, since dismissed, in September 2002. He alleges that BYU police and security officers have at various times stopped and questioned him, and that BYU has invaded his privacy and defamed him by making unflattering statements about him. He sought to seal the action, claiming that the defendants might believe that he had been declared incompetent and committed to a mental institution, and that release of this non-public information might damage his reputation with his employer, roommates, or fellow church members, even if the information was untrue. The district court denied this motion. He then filed a motion to use a

pseudonym, which was denied initially and on reconsideration.

We review the district court's denial of his motion to proceed under a pseudonym for abuse of discretion. M.M. v. Zavaras, 139 F.3d 798, 802 (10th Cir.1998). The rules of civil procedure mandate that "[e]very action shall be prosecuted in the name of the real party in interest." Fed.R.Civ.P. 17(a); Femedeer v. Haun, 227 F.3d 1244, 1246 (10th Cir.2000). There are no rules or statutes which allow parties to proceed under a fictitious name. Id. This court has, however, recognized that there may be "exceptional circumstances" in which a party may be allowed to proceed anonymously. Id. A plaintiff seeking to proceed under a pseudonym must typically show that disclosure of his identity in the public record would reveal highly sensitive and personal information that would result in a social stigma or the threat of real and imminent physical harm:

Lawsuits are public events. A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity.

Id. (quoting Doe v. Frank, 951 F.2d 320, 324 (11th Cir.1992)).

The risk that a plaintiff may suffer some embarrassment is insufficient to permit anonymity. Id., citing Doe v. Frank, 951 F.2d at 324 (denying plaintiff permission to proceed under a pseudonym sought due to his alcoholism). Further, because the public has an important interest in access to legal proceedings, we have held that its interest should be considered in determining whether some form of anonymity is warranted. Id. A plaintiff should not be permitted to proceed under a pseudonym unless the need for anonymity outweighs the public interest in favor of openness. See Zavaras, 139 F.3d at 803.

[2] Here, plaintiff's motion stated only that harmful and

prejudicial information might be made public and might harm his reputation. He gave no further basis for his request, other than a passing reference to his earlier motion to seal the case, which suggested a possible history of mental illness or psychiatric care. He did not present any particularized evidence, however, relating to any mental or psychiatric history, nor any particularized reasons why proceeding publicly would cause him real psychological or physical injury. He alleges nothing more than potential embarrassment based on vague and speculative suggestions of mental illness. Plaintiff has not alleged any threat of physical danger and the disclosure of his identity is not the injury he seeks to avoid by his lawsuit.

In short, plaintiff has not demonstrated that this is a sufficiently "exceptional" case or that the need for anonymity in this case and at this stage of the proceedings outweighs the public's interest in knowing his identity. See id. Thus, we find no abuse of the district court's discretion.

The order of the district court is AFFIRMED. Plaintiff's motion for sanctions is DENIED. The mandate shall issue forthwith.

Appendix E –Order Denying Rehearing in Lower Court

United States Court of Appeals,
Tenth Circuit.

Aaron RAISER, also known as T.G.,
Plaintiff-Appellant,
v.
CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; Brigham Young University,
Defendants-Appellees.

05-4120
Order Denying Rehearing

Filed July 27, 2006

Before Kelly, Briscoe, Lucero, Circuit Judges.

Appellant's Petition for Rehearing is denied.

Entered For the Court
Elizabeth A. Shumaker, Clerk

By: s/_____

Deputy Court Clerk

(2)

No. 06-859

FILED
JAN 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

AARON RAISER,

Petitioner,

v.

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; BRIGHAM YOUNG UNIVERSITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Petitioner Aaron Raiser ("Mr. Raiser") unnecessarily divides into two issues the question of whether the Tenth Circuit Court of Appeals (the "Tenth Circuit") improperly applied preclusive effect to its prior decision affirming the district court's denial of Mr. Raiser's motion to proceed under a pseudonym. But Mr. Raiser's petition for certiorari incorrectly assumes that a justiciable controversy exists. Thus, the five questions presented by this petition for certiorari are as follows:

1. Does a justiciable controversy exist where Mr. Raiser has requested no relief that would redress the alleged injuries he has suffered?

2. Did the Tenth Circuit correctly apply an abuse of discretion standard of review to the question of whether the district court properly denied Mr. Raiser's motion for leave to proceed under a pseudonym?

3. Did the Tenth Circuit improperly base its affirmance of the district court's denial of Mr. Raiser's motion for leave to proceed under a pseudonym on principles of res judicata and collateral estoppel?

4. Was Mr. Raiser prejudiced because he was prevented from submitting a reply memorandum, even though his initial memorandum stated no basis for granting him leave to proceed under a pseudonym?

5. Was Mr. Raiser denied due process by being forced to proceed in the litigation using his true name?

PARTIES TO THE PROCEEDINGS AND RULE 26.9 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Respondent Brigham Young University ("BYU") is a Utah non-profit corporation with no parent corporation, and no publicly-held corporation holds 10% or more of BYU's stock.

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OPINIONS AND ORDERS ENTERED IN THIS CASE

The district court's decision denying Mr. Raiser leave to proceed using a pseudonym is unreported. The Tenth Circuit's decision upholding the district court's decision is unofficially cited at *Raiser v. Church of Jesus Christ of Latter-day Saints*, 182 Fed. Appx. 810 (10th Cir. 2006) (unpublished disposition) ("*Raiser II*"). It has not been included in an official reporter. The Tenth Circuit's decision denying Mr. Raiser's petition for rehearing is unreported.

JURISDICTION

The Tenth Circuit decision of which Mr. Raiser seeks certiorari review in this Court was filed on May 31, 2006. The Tenth Circuit's order denying Mr. Raiser's petition for rehearing was filed on July 27, 2006. Mr. Raiser filed his petition for certiorari in this Court on October 23, 2006. Mr. Raiser invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). But, as explained below, the injury for which Mr. Raiser seeks relief is unredressable, thereby depriving Mr. Raiser of standing and this Court of jurisdiction.[1]

DETERMINATIVE PROVISIONS

U.S. Const. art. III, § 1, cl. 2 provides as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases

[1] Of course, this Court "has jurisdiction to determine its own jurisdiction." *See United States v. Ruiz*, 536 U.S. 622, 628 (2002).

> affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Fed. R. Civ. P. 10(a) provides as follows:

> Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Fed. R. Civ. P. 17(a) provides as follows:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest

> until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

DUCivR7-1(b)(3) provides as follows:

> Memoranda supporting or opposing all motions, except (i) motions to dismiss, (ii) motions for summary judgment as provided in DUCivR 56-1, and (iii) motions pursuant to Fed. R. Civ. P. 65, must not exceed ten (10) pages, exclusive of face sheet, table of contents, statements of issues and facts, and exhibits. A memorandum opposing a motion must be filed within fifteen (15) days after service of the motion or within such extended time as allowed by the court. A reply memorandum may be filed at the discretion of the movant within seven (7) days after service of the memorandum opposing the motion. A reply memorandum must be limited to rebuttal of matters raised in the memorandum opposing the motion and must not exceed ten (10) pages, exclusive of face sheet, table of contents, statements of issues and facts, and exhibits. No additional memoranda will be considered without leave of court. Attorneys may stipulate to shorter briefing periods and fewer memorandum pages, and the court encourages them to do so.

STATEMENT OF THE CASE

The pertinent facts in this case are adequately set forth in the Tenth Circuit's May 31, 2006, decision in *Raiser II*, 182 Fed. Appx. 810. That is the decision for which Mr. Raiser seeks certiorari review. Those pertinent facts, as that decision set them forth, are as follows:

> In 2002, Raiser filed a lawsuit against Brigham Young University ("BYU") and the City of Provo, Utah, alleging that during his interactions with BYU security and the Provo Police Department his civil rights were violated. . . . In his Motion to Dismiss, BYU made reference to Raiser's psychiatric history. Raiser moved to seal the record and moved to proceed under a pseudonym. Both of those motions were denied. Raiser appealed only the district court's denial of his motion to proceed using a pseudonym, and we affirmed, holding that Raiser had not demonstrated exceptional circumstances justifying his use of a pseudonym. Raiser v. Brigham Young Univ., 127 F.App'x 409, 411 (10th Cir. 2005) (unpublished) [("*Raiser I*")].
>
> In 2004, Raiser, now acting under the pseudonym T.G., filed a civil complaint against both BYU and The Church of Jesus Christ of Latter-day Saints (the "Church") alleging claims based on BYU's reference to his mental history in its motion during the 2002 litigation. . . . Contemporaneously, he filed a motion for permission to proceed in this case under a pseudonym. The district court denied the motion, and two motions for reconsideration. Raiser appeals.

Raiser II, 182 Fed. Appx. at 811 (footnote omitted). Following the Tenth Circuit's affirmance of the district court's decision denying Mr. Raiser leave to proceed using a pseudonym, Mr. Raiser petitioned the Tenth Circuit for rehearing. The Tenth Circuit denied that petition on July 27, 2006.

SUMMARY OF REASONS TO DENY THE PETITION

Mr. Raiser's petition for certiorari should be denied for four reasons. First, no justiciable controversy exists here. Mr. Raiser's name has already been connected with mental illness in prior litigation. Even if this Court decided that Mr. Raiser was improperly denied permission to proceed using a pseudonym, that decision would not provide any relief for the harm Mr. Raiser claims he has suffered. In other words, the cat that Mr. Raiser wishes to contain is already out of the bag; no decision by this Court can catch it.

Second, the decision of the Tenth Circuit—of which Mr. Raiser seeks certiorari review—was correct. Contrary to Mr. Raiser's assertions, the Tenth Circuit reviewed the district court's decision for abuse of discretion. And the Tenth Circuit did not improperly assign preclusive effect to its prior decision in *Raiser I*; indeed, it did not assign any preclusive effect at all. Although Mr. Raiser was entitled to file a reply memorandum if he so chose, he could not use that reply memorandum as a vehicle for introducing new arguments or rehabilitating his initial memorandum. Thus, because his initial memorandum stated no basis for granting him leave to proceed under a pseudonym—and indeed, it could not—given that Mr. Raiser's name was already connected with *Raiser I*—he was not prejudiced because he was prevented from filing a reply memorandum. Finally, Mr. Raiser was not

denied due process because he was made to proceed under his own name; his interest in privacy must be balanced against the public's right to public judicial proceedings, and Mr. Raiser did not demonstrate any exceptional circumstances that would warrant his efforts to proceed under a pseudonym. His due process rights were well protected by the Tenth Circuit's balancing of those interests.

Third, the circuit courts are unified regarding the proper analysis for determining when leave to proceed under a pseudonym should be granted; there is no circuit split to resolve.

Fourth, and finally, the analysis for determining when leave to proceed under a pseudonym should be granted is well established by the Federal Rules of Civil Procedure and virtually every circuit's case law. An opinion from this Court would add nothing to this already well-established jurisprudence.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 delineates several considerations this Court takes into account when deciding whether to grant a petition for certiorari. *See* Sup. Ct. R. 10. Although none of those considerations are present here, Mr. Raiser's petition should be denied for four reasons in particular. First, the injury Mr. Raiser claims to have suffered is unredressable. Second, the decision of the Tenth Circuit was correct. Third, there is no conflict among the circuits regarding the issues Mr. Raiser has presented in his petition. Fourth, and finally, the issues presented in Mr. Raiser's brief do not require resolution by this Court. The following sections discuss those reasons.

I. No Justiciable Controversy Exists in This Case.

This Court has made clear that "the irreducible constitutional minimum of standing contains three requirements," one of which is redressability, or "a likelihood that the requested relief will redress the alleged injury." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998) (internal quotation marks omitted). That redressability requirement is one-third of a triad that "comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *See id.* at 103–04; *see also* U.S. Const. art. III, § 2, cl. 1; *FW/PS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

Mr. Raiser's claims do not satisfy that requirement. As the Tenth Circuit pointed out in its opinion in *Raiser II*, Mr. Raiser's argument is really nothing more than a request "to put jack back in the box" after the Tenth Circuit's decision in *Raiser I* affirmed the district court's denial of leave to proceed under a pseudonym, requiring Mr. Raiser to use his own name in any further proceedings. *See Raiser II*, 182 Fed. Appx. at 812. In other words, Mr. Raiser's name is already "in the public domain" in connection with that litigation and, more specifically, the statements that were made in connection with that litigation regarding Mr. Raiser's mental condition. *See id.* at 811.

The sum total of the relief Mr. Raiser requests is "that the original order denying a pseudonym be vacated and re-heard in the trial court with a full opportunity to present argument on the motion for a pseudonym based on the outcome of the appeal." *See* Pet. for Cert. at 29–30. But that is no relief at all. Even if this Court grants Mr. Raiser every ounce of the relief he seeks, Mr. Raiser's name is already in the public

domain in connection with *Raiser I* and all the statements made therein regarding his mental state. No decision of this Court can undo that.

Moreover, even if, on remand, Mr. Raiser is allowed to proceed using a pseudonym, that would have no impact whatsoever on the district court's grant of summary judgment in favor of BYU, and the Tenth Circuit's recent affirmance of that grant, on the merits of Mr. Raiser's case. Mr. Raiser's case was a claim for money damages arising from the allegedly improper disclosure of his mental health in *Raiser I*. *See* Case No. 2:04cv896, Doc. No. 1, Compl. filed Sept. 23, 2004 (attached hereto as Addendum A). That decision is not before this Court for review, nor is the Tenth Circuit's denial of a stay of the district court proceedings on appeal.[2]

Mr. Raiser's injury is unredressable. That unredressability deprives Mr. Raiser of standing and this Court of jurisdiction. *See Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990) ("Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process."). The entirety of Mr. Raiser's petition should be dismissed on that basis.

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[2] On September 16, 2005, Mr. Raiser requested a stay pending appeal from the Tenth Circuit. That request was denied on October 6, 2005. In the meantime, Mr. Raiser himself filed motions under his own name. *See* Case No. 2:02cv896, Doc. No. 140, Decl. for Third Mot. to Compel Discovery filed Aug. 5, 2005 (attached hereto as Addendum B). Mr. Raiser himself shooed the cat out of the bag by abandoning his pseudonym.

II. The Decision of the Tenth Circuit Court of Appeals Was Correct.

Mr. Raiser attributes four errors to the Tenth Circuit's decision. As the following sections demonstrate, none of those purported errors is grounded in fact or law.

A. The Tenth Circuit Applied the Correct Standard of Review.

Mr. Raiser argues that the Tenth Circuit erroneously subjected the district court's decision forbidding him from proceeding under a pseudonym to de novo review rather than abuse of discretion review. According to Mr. Raiser, had the Tenth Circuit reviewed the district court's decision for abuse of discretion, it would have recognized that the district court had abused *its* discretion, and Mr. Raiser would have prevailed on appeal. *See* Pet. for Cert. at 19–21. Mr. Raiser's argument fails for at least two reasons.

First, contrary to Mr. Raiser's contention, the Tenth Circuit explicitly stated that it "review[ed] a district court's denial of a motion to proceed under a pseudonym for abuse of discretion." *See Raiser II*, 182 Fed. Appx. at 811. This Court should take the Tenth Circuit's explanation of its analysis at face value. *See Hackett v. Barnhart*, 395 F.3d 1168, 1173 (10th Cir. 2005); *McGuckin v. Smith*, 974 F.2d 1050, 1056 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). The Tenth Circuit therefore applied what Mr. Raiser concedes to be the proper standard of review.

Second, de novo review is more exacting than, and indeed encompasses, abuse of discretion review. *See United States v. Smith*, 308 F.3d 726, 748 (7th Cir. 2002) (noting that de

novo review is more stringent than abuse of discretion review); *see also Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998) ("An abuse of discretion occurs when the district court bases its ruling on an erroneous conclusion of law."). It is difficult to understand how Mr. Raiser's claims could have failed under de novo review but prevailed under abuse of discretion review. Therefore, even if the Tenth Circuit had applied an incorrect standard of review—which it did not—such an error would not result in any injury to Mr. Raiser.

B. The Tenth Circuit Did Not Base its Decision on Principles of Res Judicata or Collateral Estoppel.

Mr. Raiser argues that the Tenth Circuit improperly applied principles of res judicata and collateral estoppel to hold that its decision in *Raiser I* wielded preclusive effect upon its decision in *Raiser II*. He articulates two reasons for why this is allegedly so. First, Mr. Raiser contends that because the decision denying him leave to proceed under a pseudonym was discretionary, it cannot wield any preclusive effect.[3] *See* Pet. for Cert. at 5–8. Second, Mr. Raiser argues that the Tenth Circuit's application of res judicata principles was inappropriate because (1) he did not have motivation or

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[3] Mr. Raiser supports this argument with only a recitation of facts followed by a restatement of his conclusion. *See id.* at 6–8. He cites no legal authority of any kind supporting that position. *See id.* Mr. Raiser has not adequately briefed this issue. *See* Fed. R. App. P. 28(a)(9) (requiring that argument contain "contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies"). That failure is a sufficient basis for denial of Mr. Raiser's petition for certiorari on this issue.

need to contend as strenuously in *Raiser I*—as he does now—that a pseudonym was necessary to protect him; and (2) he only recently learned that BYU allegedly employed wrongful means to learn that he had a psychiatric history. *See* Pet. for Cert. at 28.

Both arguments fail for the same simple reason: the Tenth Circuit did not apply principles of collateral estoppel or res judicata to reject Mr. Raiser's contentions. The Tenth Circuit set forth its rationale for rejecting Mr. Raiser's contentions as follows:

> *In cases where the sensitive information has already been disclosed during a party's prior litigation under its real name, the social interest in allowing a party to proceed anonymously is limited.* Placing this matter in context, the issue brought to us for our consideration has been previously considered and ruled upon in Raiser I. In the earlier case, substantially similar assertions regarding the use of a pseudonym had been raised to a panel of this court, and denied. *The consequence of that denial is that Raiser's name remained in the public domain in connection with the litigation.* To paraphrase the present situation, Raiser's request is equivalent to asking us to put jack back in the box, that is, to collaterally review a previous decision of this court. That we cannot do. *Raiser has not demonstrated sufficient "exceptional circumstances" justifying his use of a pseudonym in this proceeding.*

Raiser II, 182 Fed. Appx. at 811–12 (internal citation omitted) (emphasis added). Although the Tenth Circuit referenced *Raiser I* and its similarity to *Raiser II*, it did so only to point out Mr. Raiser's inability to demonstrate

"exceptional circumstances" as required by Tenth Circuit jurisprudence: because Mr. Raiser had lost his prior appeal from a denial of leave to proceed under a pseudonym in *Raiser I*, when the issue of his "psychiatric history" was raised, his name was already associated with the psychiatric issues from which he sought to disassociate himself by proceeding under a pseudonym in this case. *See id.* The Tenth Circuit's approach is not only not an abuse of discretion, it is patently correct. *See M.M. v. Zavaras*, 139 F.3d 798, 802 (10th Cir. 1998). The Tenth Circuit did not refer to *Raiser I* to apply any preclusive effect it might possess to *Raiser II*. Indeed, the Tenth Circuit did not so much as mention res judicata, collateral estoppel, or their elements. *See Burrell v. Armijo*, 456 F.3d 1159, 1172 (10th Cir. 2006) (enumerating elements of collateral estoppel); *Nwosun v. Gen. Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir. 1997) (enumerating elements of res judicata). Mr. Raiser's contention that the Tenth Circuit improperly applied preclusive principles is therefore misplaced.

Despite the simplicity of the answer to the question Mr. Raiser poses, BYU wishes to address and correct several of Mr. Raiser's factual assertions. First, although it is not relevant to the resolution of this petition, BYU disputes Mr. Raiser's contention BYU's disclosure of Mr. Raiser's mental state was a breach of fiduciary duty or wrongful in any other way. *See* Pet. for Cert. at 28. Second, BYU disputes Mr. Raiser's contention that he somehow had less "motivation" to strenuously contend for leave to use a pseudonym in *Raiser I* than he did in this case. *See id. Raiser II* is, for all intents and purposes, identical to *Raiser I* in that both involved a motion—brought by Mr. Raiser—for leave to proceed using a pseudonym. Moreover, in both *Raiser I* and *Raiser II*, Mr. Raiser sought that leave for the same reason: to avoid any stigma attached to what he claims is a misleading psychiatric

history. Third, the motivations and intentions that influenced Mr. Raiser's litigation decisions are not part of the record on appeal and, at any rate, have no bearing on this petition. *See id.* Fourth, BYU disputes that the denial of leave to proceed using a pseudonym forced Mr. Raiser to "suffer the same, or greater injury, if he were required to litigate in his actual name." *See id.* The pseudonym issue is separate from the merits of Mr. Raiser's case, which was a claim for money damages stemming from BYU's allegedly wrongful disclosure of Mr. Raiser's mental state in *Raiser I*. *See* Addendum A, Compl. The denial of leave to use a pseudonym did not cause him an equivalent harm.

In fine, the Tenth Circuit decision was not an improper application of res judicata or collateral estoppel principles. This Court should not grant Mr. Raiser's petition as it pertains to this issue.

C. The District Court Did Not Abuse Its Discretion By Deciding Mr. Raiser's Motion Without A Reply Memorandum from Mr. Raiser.

Mr. Raiser argues that although BYU and the Church did not timely file their memoranda in response to Mr. Raiser's motion for leave to proceed using a pseudonym, the district court decided Mr. Raiser's motion based on new issues raised in those memoranda and without allowing Mr. Raiser to file a reply memorandum. *See* Pet. for Cert. at 18–19. In responding to that contention, the Tenth Circuit concluded that although Mr. Raiser was entitled to file a reply memorandum, nothing in that memorandum could have altered the decision of the district court based on the papers before it. *See Raiser II*, 182 Fed. Appx. at 812. The Tenth Circuit was correct.

Pursuant to District of Utah Rule 7-1(b)(3), Mr. Raiser indisputably was permitted to file a reply memorandum. But that reply memorandum "must be limited to rebuttal of matters raised in the memorandum opposing the motion." *See* DUCivR7-1(b)(3); *see also King of the Mountain Sports, Inc. v. Chrysler Corp.*, 185 F.3d 1084, 1091 n.2 (10th Cir. 1994) (issues not raised in an opening memorandum are waived). In other words, that reply memorandum could not have served as a vehicle for raising new arguments. As the Tenth Circuit correctly pointed out, nothing in Mr. Raiser's initial memorandum provided any basis for concluding that Mr. Raiser had presented the requisite "exceptional circumstances" justifying use of a pseudonym. *See Zavaras*, 139 F.3d at 802; *see also* Case No. 2:04cv896, Doc. No. 3, Mot. for Supplemental Relief filed Sept. 23, 2004 (excerpts of which are attached hereto as Addendum C). Indeed, it could not have: as demonstrated above, Mr. Raiser's name was already in the public domain in connection with *Raiser I* and the statements regarding Mr. Raiser's mental state made therein, and that fact alone supports the Tenth Circuit's decision. Mr. Raiser therefore cannot demonstrate that he was prejudiced because he did not file a reply memorandum.

Moreover, Mr. Raiser's petition provides no insight as to what "new" issues were raised in the response memoranda of BYU and the Church. *See* Pet. for Cert. at 19. Indeed, nothing "new" was raised in either memorandum. Both BYU and the Church responded only to Mr. Raiser's contention that he should be allowed to proceed using a pseudonym. *See* Case No. 2:04cv896, Doc. No. 29, Church's Mem. in Opp. filed April 19, 2005 (attached hereto as Addendum D); Case No. 2:04cv896, Doc. No. 32, BYU's Mem. in Opp. filed April 20, 2006 (attached hereto as Addendum E). And both BYU and the Church relied on the reasons prior courts had articulated for denying Mr. Raiser's previous attempt to

proceed using a pseudonym. It goes without saying that Mr. Raiser was a party to those proceedings and was surely aware of the courts' resolution of that attempt. Mr. Raiser was not denied the opportunity to respond to "new" issues.

D. Mr. Raiser Was Not Denied Due Process of Law.

Mr. Raiser argues, in essence, that the district court's denial of his request to proceed using a pseudonym denied him due process of law. He attempts to couch that argument in a perceived conflict between Federal Rules of Civil Procedure 10 and 17—which require litigants to proceed using their own names—and the Due Process Clause of the Fifth Amendment. *See* Pet. for Cert. at 8; *see also* Fed. R. Civ. P. 10(a), 17(a). But there is no such conflict, and Mr. Raiser was not denied due process of law.

It is true that the Federal Rules of Civil Procedure require, without any evident exception, that litigants proceed in their own names. *See* Fed. R. Civ. P. 10(a), 17(a). But despite that seemingly rigid rule, courts have recognized the occasional need for a pseudonym under certain circumstances and have interpreted Rules 10(a) and 17(a) as creating a "presumption of openness" rather than a rigid prohibition on the use of pseudonyms. *See Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992). To determine whether a litigant should be permitted to proceed using a pseudonym, courts have developed an analysis that balances a litigant's right to privacy with the public's countervailing common law right of access to judicial proceedings, which is grounded in the First Amendment. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000). Courts must balance those two rights when ruling on a motion requesting leave to proceed using a pseudonym. *See, e.g., id.*; *Zavaras*,

139 F.3d at 803; *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Frank*, 951 F.2d at 323; *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). That balancing requires an analysis of various factors, including (1) the justification for pseudonym use, (2) risk of harm if a pseudonym is not employed, (3) the age of the movant, (4) the nature of the defendant, and (5) the risk of unfairness. *See James*, 6 F.3d at 218; *see also Advanced Textile Corp.*, 214 F.3d at 1068; *Zavaras*, 139 F.3d at 803.

Thus, there is no conflict between Rules 10(a) and 17(a) and due process principles. Even despite the facially inflexible language of those rules, courts interpret them in a manner sensitive to litigants' right to privacy while bearing in mind that the public has a concomitant right of access to judicial proceedings. As applied, Rules 10(a) and 17(a) do not prohibit a litigant from proceeding under a pseudonym in all cases.

Moreover, Mr. Raiser was not denied due process. The Tenth Circuit engaged in the aforementioned balancing test, as required by Tenth Circuit jurisprudence. *See Raiser II*, 182 Fed. Appx. at 811; *see also Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000). And, as demonstrated above, Mr. Raiser simply did not demonstrate an exceptional circumstance justifying use of a pseudonym; he had already failed in his prior attempt to obtain leave to proceed using a pseudonym, and there was nothing to be gained by granting such a request after the fact. *See Raiser II*, 182 Fed. Appx. at 812. It is true that some courts have held that mental illness may be one circumstance justifying use of a pseudonym. *See Doe v. Blue Cross & Blue Shield of R.I.*, 794 F. Supp. 72, 74 (D.R.I. 1992). But, as explained above, Mr. Raiser's mental state could not serve as a basis for permitting him to use a pseudonym in this case. As explained

supra, given the Tenth Circuit's decision in *Raiser I*, any stigma that may arise because of statements referring to Mr. Raiser's mental state has already arisen. Permitting Mr. Raiser to proceed under a pseudonym in this case would not have provided Mr. Raiser any relief.[4] And it is well accepted that the circumstances justifying use of a pseudonym are "exceptional." *See Femedeer*, 227 F.3d at 1246. Such exceptional circumstances were not present in this case.

III. The Circuits Are Not Split Regarding the Analysis Applicable to Motions Seeking Leave to Proceed Using a Pseudonym.

Without exception, every circuit that has reviewed a district court decision granting or denying leave to proceed under a pseudonym has employed the same analysis: a balancing of the litigant's privacy interests with the public's right to open and public proceedings. *See, e.g.*, *Advanced Textile Corp.*, 214 F.3d at 1068; *Zavaras*, 139 F.3d at 803; *James*, 6 F.3d at 238; *Frank*, 951 F.2d at 323; *Stegall*, 653 F.2d at 186. District courts from remaining jurisdictions have applied the same analysis. *See Doe v. Hartz*, 52 F. Supp. 2d 1027, 1045 (N.D. Iowa 1999) *Doe v. Bell Atl. Business Sys. Servs., Inc.*, 162 F.R.D. 418, 420 (D. Mass. 1995); *Doe v. Provident Life & Accident Ins. Co.*, 176 F.R.D. 464, 467–68 (E.D. Pa. 1997). In sum, the various jurisdictions of the federal system are united in applying this approach. This

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[4] Many of the arguments Mr. Raiser presents in his petition for certiorari request this Court to review the Tenth Circuit's decision in *Raiser I*, not *Raiser II*. But the time has long passed for Mr. Raiser to petition this Court for certiorari review of the Tenth Circuit's decision in *Raiser I*. *See* Sup.Ct.R. 13.1.

Court need not grant Mr. Raiser's petition for certiorari to impose uniformity on this already-uniform approach.[5]

IV. The Issues Presented in Mr. Raiser's Petition Do Not Require This Court's Attention.

There is already a clear mechanism in place for determining when a litigant may proceed using a pseudonym. Federal Rule of Civil Procedure 10 already requires pleading captions to "include the names of all the parties." *See* Fed. R. Civ. P. 10(a). Federal Rule of Civil Procedure 17 already provides that "[e]very action shall be prosecuted *in the name of the real party in interest*." *See* Fed. R. Civ. P. 17(a) (emphasis added). In other words, there already exists a clearly established presumption that actions are to be brought in the parties' own names. As the cases cited in the preceding section demonstrate, the courts of appeal have had no difficulty applying that standard or granting exceptions to that standard as appropriate. Granting certiorari to review the Tenth Circuit's decision in this case would add nothing to that established—and proper—jurisprudence.

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[5] Even if the Tenth Circuit had misapplied this analysis—which it did not—that is not a basis for granting Mr. Raiser's petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

CONCLUSION

For all of the foregoing reasons, this Court should deny Mr. Raiser's petition for writ of certiorari.

Dated: January 19, 2007.

Respectfully submitted,

DANIEL L. STEELE
Counsel of Record
BENNETT TUELLER JOHNSON & DEERE
3165 East Millrock Dr., Suite 500
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Counsel for Respondent
Brigham Young University

APPENDIX

ADDENDUM A

In the United States District Court
District of Utah

[Filed September 23, 2004]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints,
Brigham Young University,
Defendants.

COMPLAINT

Plaintiff complains against defendants and for causes of action alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a resident of Fresno County, State of California;

2. Defendants are each corporations organized and existing pursuant to the laws of the State of Utah. At

all times relevant hereto, was authorized to and was doing business in Utah.

3. This action is brought pursuant to 42 U.S.C. § 1983, 28 U.S.C. and 20 U.S.C. § 1232g and state common law.

4. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1331, causes of action exists founded upon the U.S. Constitution or federal law.

5. Jurisdiction is proper in this court pursuant to 28 U.S.C. § 1332, state law causes of action exists and diversity exists; the amount in controversy exceeds $75,000 exclusive of costs.

6. Venue is proper in this court is proper in this court pursuant to 28 U.S.C. § 1391, the acts giving rise to this action having arisen in Utah.

ALLEGATIONS RELEVENT TO ALL CLAIMS FOR RELEIF

7. On or about January 1992 Plaintiff spoke with his stake president of the BYU 5th Stake, Eugene Bramhall.

8. This was an interview in order for Plaintiff to get into BYU as a graduate student.

9. Plaintiff had previously graduated from BYU.

10. As a condition, without giving a reason why, Plaintiff was required to meet with a psychologist at the BYU counseling center.

11. Eugene Bramhall was also the general counsel for BYU.

12. Plaintiff met with the psychologist and answered some questions he believed were pertinent and declined to answer many questions or to take any tests.

13. Plaintiff was allowed to enroll in classes at BYU spring term for 1992.

14. It is alleged that prior to the interview Plaintiff's bishop Dan Towsey, informed the stake President that Plaintiff had been institutionalized in another state and "declared incompetent".

15. This information that Plaintiff had a psychiatric history was in turn communicated to others of the general counsel staff during the course of business.

16. This information, that Plaintiff had an alleged psychiatric history or the like, was also kept part of Plaintiff official school records.

17. On or about 2 November 2003, defendant Brigham Young University through their General Counsel published that information in a public document that the Plaintiff in this case had a "known ... psychiatric history".

18. Said information was published out of malice.

19. This publication was in violation of § 1232g - Family educational and privacy rights of 28 U.S.C. which requires that a student's education records be kept confidential.

20. However, despite that portrayal of Plaintiff, that information was only known for all practical purposes to the defendants.

21. While if the fact that there exists any court cases regarding Plaintiff's alleged institutionalization, General Counsel to BYU would not have been able to say for sure that the person referred to in any such case was indeed Plaintiff without the corroborating information which General Counsel to BYU received via the church channels such as his bishop and stake president.

22. Further defendant Brigham Young University could not have been certain that Plaintiff in this case was the person in any court case mentioning his institutionalization without the corroborating information from the defendant's police.

23. Plaintiff's stake president in giving out said confidential information was acting within the scope of his duties for The Church of Jesus Christ Of Latter-Day Saints who benefit from the service of their stake presidents.

24. Alternatively, information that Plaintiff had been institutionalized could have come from the defendant's police department who would be obligated to keep that information confidential and separate from their employer.

25. This information was also given to the defendant's administrators via either their General Counsel or police or both.

26. Any such information concerning Plaintiff would be required to be maintained confidential within the church.

27. Despite the fact Plaintiff was institutionalized he did not have a psychiatric history and was so institutionalized due to lies of others and some very extreme due process of law violations.

28. The other allegation based on circumstantial facts is that the police communicated the information to defendant's General Counsel or administration that Plaintiff was institutionalized.

29. It is alleged on circumstantial facts is that defendant's General Counsel communicated the administration the information that Plaintiff was institutionalized.

30. It is alleged on circumstantial facts is that defendant's General Counsel or administration communicated the information that Plaintiff was institutionalized to the police.

31. That information induced or influenced the administration or police to disbelieve any complaints Plaintiff had regarding any mistreatment and torts by defendant's personnel which had occurred such as civil rights violations, defamation by the school's newspaper in various articles about Plaintiff and breach of privacy by certain student security personnel.

32. That information induced or influenced police to treat Plaintiff differently and comit torts against him.

33. Defendant BYU has also violated the American's with disabilities Act in treating him differently and allowing torts to be committed against him and disregarding his complaints concerning the torts because of his mental disability or perceived mental disability.

34. Also it amounts to a violation of the separation of church - state clause of the U.S. Constitution as the sponsoring church of defendant is sharing otherwise confidential information with the police force of defendant via their stake president and visa versa.

35. The stake president is sharing confidential information about Plaintiff with the police.

36. The stake president and general counsel are sharing that information with the administration.

37. The police are sharing that information with the administration.

38. Plaintiff was a student there in 2002 and was subject to various civil rights violations such as unreasonable seizure and had student security breach Plaintiff's privacy by approaching a classmate of Plaintiff's and divulging damaging information about Plaintiff to another classmate based on confidential police records.

39. Defendant's administration has been deliberately indifferent to Plaintiff's complaints about these torts.

FIRST CLAIM FOR RELEIF
(Breach of Privacy - Both Defendants)

40. Plaintiff incorporates the allegations contained in paragraphs 1 through 39 above as if set forth in full at this point.

41. Plaintiff had a reasonable expectation of privacy that any psychiatric history that would have been communicated to Plaintiff's state president by his bishop or to the police would have remained confidential and not be published in public forum.

42. Defendants have taken a private fact of the Plaintiff that were made in confidence and published those in a public forum and that fact was not of public concern.

43. Defendants' actions were intentional and highly offensive to a reasonable person of the community.

44. Plaintiff has been injured as a result of the breach mentally and emotionally;

45. Plaintiff has suffered damage to his reputation also and a loss of respect amongst his peers.

46. Plaintiff has as a result, suffered a damage to his career.

47. Actions of defendant are the proximate cause of Plaintiff's injury.

SECOND CLAIM FOR RELEIF
(Defamation - BYU)

48. Plaintiff incorporates the allegations contained in paragraphs I through 47 above as if set forth in full at this point.

49. Defendant has published false and misleading information of and concerning Plaintiff to other persons.

50. Defendant's actions were intentional.

51. Actions of defendant did and have tended damaged reputation of Plaintiff.

52. Plaintiff has been injured as a result of Defendant's actions.

53. The communications that Plaintiff has the alleged disability is false, leading a person to believe Plaintiff is mentally ill.

54. Plaintiff has been injured as a result, suffering a damage to his reputation in the community and to those reading said publication and causing damage to his career.

55. Actions of defendant are the proximate cause of Plaintiff's injury.

56. Plaintiff has been injured in his reputation, has been damaged emotionally.

THIRD CLAIM FOR RELEIF
(False Light - BYU)

57. Plaintiff incorporates the allegations contained in paragraphs 1 through 56 above as if set forth in full at this point.

58. Defendant did publish false and misleading information to a wide group of persons and to the public that Plaintiff had a "known ... psychiatric history".

59. That information is false and misleading to induce the reader to believe Plaintiff has some psychiatric disability which is not true.

60. Such publication placed Plaintiff in false light.

61. Such publication of false and misleading is outrageous and highly offensive to a reasonable person in the community.

62. The defendant was aware of the falsity of their publication or disregarded whether the matter was false or not.

63. Plaintiff has been injured as a result, suffering a damage to his reputation in the community and to those reading said publication and causing damage to his career and has been damaged emotionally.

64. Actions of defendant are the proximate cause of Plaintiff's injury.

FOURTH CLAIM FOR RELEIF
(42 U.S.C. § 1983 Violation of Separation of Church State - 1st Amend. - BYU)

65. Plaintiff incorporates the allegations contained in paragraphs 1 through 64 above as if set forth in full at this point.

66. Defendant is authorized to maintain a state empowered police force via state statute.

67. That statute, which allows defendant to maintain a state empowered police force, fosters an excessive governmental entanglement with religion.

68. Defendant's police are supervised and controlled by a religious institution that is presided over by a full time church leader. The typical city council/mayorial control over the police via the electorate does not exist.

69. Insufficient state oversight and control of that authority does not exist.

70. Defendant has used the state police power in a manner not intended by the state in using the police to further the religious objectives of defendant.

71. The state/church entanglement has injured Plaintiff has allowed private information concerning Plaintiff to be exchanged between defendant and its police.

72. Said information was exchanged and released to the public and did damage Plaintiff in his reputation and career.

73. Said misuse of information resulted from a religiously oriented custom or policy on behalf of the defendant.

74. Said misuse of information otherwise resulted from a custom or policy, failure to train or lack of administrative oversight on behalf of the defendant.

75. Plaintiff has suffered damage to his reputation, including loss work opportunities and suffered mentally and emotionally.

76. Actions of defendant are the proximate cause of Plaintiff's injury.

FIFTH CLAIM FOR RELEIF

(Violation of American's with disabilities Act - BYU)

77. Plaintiff incorporates the allegations contained in paragraphs 1 through 76 above as if set forth in full at this point.

78. Defendant has allowed torts to be committed against him due to their belief that Plaintiff has a mental disability.

79. Defendant has ignored Plaintiff's complaints regarding the torts due to that belief.

80. Plaintiff has suffered damage to his reputation, including loss work opportunities and suffered mentally and emotionally.

81. Actions of defendant are the proximate cause of Plaintiff's injury.

ON EACH OF PLAINTIFF'S CLAIM S FOR RELEIF

1. For Damages of $1,750,000 against Brigham Young University; For Damages of $1,750,000 against The Church of Jesus Christ Of Latter-Day Saints;

2. For costs of suit;

3. For such further relief as the Court deems proper under the circumstances.

DATED this September 20, 2004.

/s/_____
T.G.

ADDENDUM B

In the United States District Court
District of Utah

[~~Filed August~~ 5, 2005]

Case No. 2:04 CV 896

Aaron Raiser,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints,
Brigham Young University,
Defendants.

Declaration for Third Motion to Compel Discovery

Judge: Campbell

I, Aaron Raiser, certify that I have attempted in good faith to resolve the issues contained in the Third motion to compel discovery with the defendants to no avail.

DATED this July 31, 2005.

/s/_____
Aaron Raiser

I certify that a true and correct copy of **Declaration for Third Motion to Compel Discovery** was mailed August 1, 2005 to
Stephen W. Geary (Counsel for Church)
60 East South Temple, #1800
Salt Lake City, Utah 84145-0120
Dan Steele (Counsel for Brigham Young University)
3865 S. Wasatch Blvd. Suite 300
Salt Lake Citify, Ut 84109

/s/_____
Aaron Raiser

ADDENDUM C

In the United States District Court
District of Utah

[Filed September 23, 2004]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints,
Brigham Young University,
Defendants.

Motion for Pseudonym;
Memorandum of Points and
Authorities

Plaintiff motions for a Pseudonym in the captioned case. This motion is based on the following memorandum and the Affidavit of T.G.

This case involves a statement published by defendants that Plaintiff has a "known ... psychiatric history" and the related facts surrounding that statement. Because the information of the cases is of a private and personal nature

and because Plaintiff would be damaged by giving out his identity to those outside this case, and because other federal courts allow for anonymity in similar cases, a Pseudonym is sought.

If a Pseudonym is not permitted Plaitniff asks that the case not be made public until after he can appeal. A Pseudonym would also appear on the court docket for the counsel of record.

Respectfully,

DATED September 20, 2004.

/s/_____
T.G.

Memorandum of Points and Authorities

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IV. Based on the facts of this case, and in order to maintain consistency with other federal courts, a pseudonym should be allowed . . . . . (24)

* * *

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Summary of the Argument

Neither the Constitution or Federal Rules of Civil Procedure specifically state that the use of a pseudonym is forbidden and its use has been sanctioned by the Supreme Court in appropriate circumstances. This Circuit uses a balancing test between the competing public and private interests when deciding whether to allow a pseudonym in a particular case. Other Circuits allow for the use a pseudonym where a litigants mental health status is an issue of the case or would otherwise be made public. Based on the facts of this case and in order to maintain consistency with other federal courts, a pseudonym should be allowed.

I.
The use of a pseudonym is not specifically forbidden by the Constitution or FRCP.

The Constitution, Amendment VI, guarantees public trials for criminal trials and is silent as to civil trials.

FRCP Rule 10(a) requires the litigants name to appear in the caption. Rule 17 requires the case to be brought in the actual name of the litigant. However, in *Doe v. Bolton,* 410 U.S. 179 (1973) (a case involving abortion) and *Poe v. Ullman,* 367 U.S. 497 (1961) (challenge to state contraceptive law) the Supreme Court implicitly allowed pseudonyms without incident and Courts since have generally recognized exceptions to Rules 10(a) & 17. *See*

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Bates v. City of Little Rock, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).[4]

A Rhode Island federal court stated the following concerning the appropriateness of allowing a plaintiff to proceed using a pseudonym:

> I find persuasive the analysis of litigants' requests for pseudonymity set forth in *Doe v. Rostker*, 89 F.R.D. 158 (N.D. Cal. 1981). The Court explained that the general rule requiring plaintiffs to include the names of all parties in their complaints is not set in stone: Courts have carved out limited exceptions to [this rule] where the parties have strong interests in proceeding anonymously. Although no express standard exists setting forth these exceptions, this court's review of numerous cases has uncovered some classifiable characteristics. The most common instances are cases involving abortion, mental illness, personal safety, homosexuality, transsexuality and illegitimate or abandoned children in welfare cases. The common thread running through these cases is the presence of some social stigma or the threat of physical harm to the plaintiffs attaching to disclosure of their identities to the public record.

See *John Doe v. Blue Cross & Blue Shield*, 794 F. Supp. 72, 74 (D.R.I., 1992).

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[4] Noted in *Defendant Doe's Quest for Anonymity: Is the Hurdle Insurmountable?*, 29 Loy. U. Chi. L.J. 141, 147 (1997).

II.

This Circuit uses a balancing test.

The Tenth Circuit uses a "balancing of competing interests" test when considering the appropriateness of using a pseudonym in a case. See M.M. v. Zavaras, 139 F.3d 798, 800 (10th Cir. 1998). "The issue of

* * *

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are given only custodial care and not treatment, all society loses from their lessened ability to work and to contribute.

III.

Other Circuits allow for the use a pseudonym where a litigants mental health status is an issue.

Federal cases where disclosure of a litigant's psychiatric history or mental health status shows that such cases generally allow a pseudonym.

Doe v. Bolton, 410 U.S. 179 (1973)- pseudonym allowed where a woman alleged that her condition of poverty and of being abandoned by her husband as well as being a psychiatric patient rendered her to be unable to care for or support the new child.

Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) - pseudonym allowed for a psychiatric patient who sought class action status, requesting a preliminary injunction to force defendant

government agencies to pay for care in a private mental institution.)

Woe v. Cuomo, 638 F. Supp. 1506 (D.N.Y., 1986) *rev'd,* 729 F.2d 96 (2d Cir.), *cert. denied,* 105 S. Ct. 339 (1984) - pseudonym allowed for Plaintiff psychiatric patients who brought an action against defendant governor, defendant doctor, defendant commissioner, and defendant hospital alleging constitutional violations related to their right to adequate treatment.

* * *

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vocation as an attorney, his privacy interest was sufficient to proceed anonymously.

Others cases allowing pseudonymity for alleged mental illness are *Doe v. Harris,* 495 F. Supp. 1161 (S.D.N.Y.1980); *Doe v. Anrig,* 692 F.2d 800 (lst. Cir. 1982); *Doe v. New York Univ.,* 666 F.2d 761 (2d Cir. 1981); *Doe v. Marshall,* 622 F.2d 118 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981); *Koe v. California,* 573 F.2d 761 (2d Cir. 1978); *Doe v. Hampton,* 566 F.2d 265 (D.C. Cir. 1977); *Anonymous v. Anonymous,* 558 F.2d 677 (2d Cir. 1977); *Larry P. v. Riles,* 495 F. Supp. 926 (N.D. Cal. 1979); *Doe v. Gallinot,* 486 F. Supp. 983 (C.D. Cal. 1979), *aff'd,* 657 F.2d 1017 (9th Cir. 1981); *Doe v. Lally,* 467 F. Supp. 1339 (D. Md. 1979); *Woe v. Mathews,* 408 F. Supp. 419 (E.D.N.Y. 1976), *aff'd mem. sub nom. Woe v. Weinberger,* 562 F.2d 40 (2d Cir. 1977), *cert. denied,* 434 U.S. 1048 (1978).

IV.

Based on the facts of this case, and in order to maintain consistency with other federal courts, a pseudonym should be allowed.

Plaintiff has shown that he has a very strong interest in proceeding with a pseudonym because of the social stigma surrounding having a "psychiatric history" and the subsequent difficulties arising from that label and he has shown that this information can easily cause harm in finding work or to his career.

[p.25]

While the public has an interest in being aware of who litigants are, that interest is not a protected interest, and the main interest lies with the litigants themselves and Courts generally have recognize exceptions and allowed a litigant to proceed pseudonymously. The proceedings themselves would still be public and any litigant having an significant interest in the outcome of the case could seek to join the case. Thus the public interest in this case is outweighed by the Plaintiff's interest in avoiding social stigma and avoiding difficulties that could affect his reputation his career or his hireability. Society also has an interest in Plaintiff being gainfully employed and productive and they have an interest in seeing that each member of society have fair access to the court system to redress wrongs which inevitably benefit society as a whole.

Further supporting allowing Plaintiff to proceed pseudonymously is that many other federal courts permit a litigant to use a pseudonym where a litigant has a mental health or psychiatric history which fact could be found out by

the public via the litigation, causing harmful prejudice or social stigma against the litigant, which the courts find outweighs the public interest in having the name of the litigant made public.

In light of these arguments Plaintiff therefore asks that a pseudonym be allowed.

* * * *

ADDENDUM D

R. Willis Orton (2484)
Stephen W. Geary (9635)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
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Attorneys for Defendant The Church of
Jesus Christ of Latter-day Saints

In the United States District Court
For the District of Utah
Central Division

[Filed April 19, 2005]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints, and
Brigham Young University,
Defendants.

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM

Defendant The Church of Jesus Christ of Latter-day Saints (the "Church"), through counsel, hereby opposes Plaintiff's Motion for Pseudonym dated September 20, 2004, for the same reasons which compelled the court in *Aaron Raiser v. Brigham Young University, et al.*, case no. 2:02cv975 TC, to deny the plaintiff's motion for pseudonym in that matter and for the reasons and case law set forth in the March 29, 2005, Order and Judgment of the United States Court of Appeals for the Tenth Circuit in *Raiser v. Brigham Young University,* No. 04-4025, a copy of which is attached hereto as Exhibit "A".

DATED this 19th day of April, 2005.

KIRTON & McCONKIE

By /s/_____
R. Willis Orton
Stephen W. Geary

Attorneys for Defendant The Church of Jesus Christ of Latter-day Saints

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2005 I caused a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM** to be hand-delivered to the following:

T.G.

(at the United States Courthouse)

Daniel Steele
Bennett, Tueller Johnson & De re
3865 South Wasatch Boulevard, Suite 300
Salt Lake City, Utah 84109-3865

and a copy mailed, postage prepaid, to:

Erik G. Davis
Office of General Counsel
Brigham Young University
A-350 ASB
Prove, Utah 84602

/s/_____
R. Willis Orton

ADDENDUM E

Daniel L. Steele (6336)
David M. Kono (8770)
Bennett Tueller Johnson & Deere
Attorneys for Defendant Brigham Young University
3865 South Wasatch Blvd., Suite 300
Salt Lake City, Utah 84109
Telephone: (801) 272-5600

In the United States District Court
For the District of Utah
Central Division

[Filed April 20, 2005]

Case No. 2:04cv00896 TC

T.G.,
Plaintiff,

v.

The Church of Jesus Christ
Of Latter-Day Saints, and
Brigham Young University,
Defendants.

DEFENDANT BRIGHAM YOUNG UNIVERSITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM

Defendant Brigham Young University ("BYW"), by and through its counsel, hereby joins in The Church of Jesus Christ of Latter-Day Saints' (the "Church") Memorandum in Opposition to Plaintiff's Motion for Pseudonym (the "Church's Memorandum") filed by Church on or about April 19, 2005 and adds the following additional argument.

ARGUMENT

Plaintiff desires to pursue his claims under the cover of anonymity and has, to date, identified himself as TG. However, as correctly articulated by this Court in a hearing on various pending motions held on April 19, 2005, Plaintiff has not obtained this Court's permission to proceed under a pseudonym.[1]

While some courts have taken the position that an action filed under pseudonym is null and void per se, see e.g., Doe v. United States Department of Justice, 93 F.R.D. 483, 484 (D. Colo. 1982) (holding that a "civil action has not been

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[1] In the hearing of April 19, 2005, the Court correctly denied Plaintiff's Motion for Sanctions wherein Plaintiff argued that the Church's reference to other legal proceedings filed by Plaintiff, including one other pending matter now before this very Court, breached his privacy by revealing his true identity. In denying Plaintiff's Motion for Sanctions, the Court properly noted that Plaintiff does not have a vested privacy fight in his use of a psuedonym because he does not have the Court's permission to proceed under the cover of a psuedonym.

commenced and it will not be commenced unless and until ... the title of the action shall include the names of all the parties"), the 10th Circuit has recognized a narrow exception for cases involving "matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity." M.M v. Zavaras, 139 F.3d 798, 803 (10th Cir. 1998) (additional citations omitted). Regardless, to BYU's counsel's knowledge, no case provides the inherent fight for a plaintiff to proceed anonymously without a court order. Certainly, Plaintiff has not cited to any such case nor can he point to any court order that authorizes his efforts to proceed as an anonymous litigant.

Furthermore, the recent decision by the 10th Circuit Court of Appeals in Raiser v. Brigham Young University, No. 04-4025, a copy of which is attached as Exhibit "A", is dispositive of Plaintiff's Motion. Plaintiff cannot point to any facts or circumstances which materially distinguish his Motion here with the virtually similar motion sought in the Raiser ease which was denied by this Court and recently affirmed, on an interlocutory basis, by the 10th Circuit Court of Appeals.

BYU respectfully submits that Plaintiff is not entitled to proceed under a pseudonym. His Motion should therefore be denied with an order that further requires Plaintiff to forthwith file an appearance in his own name.

DATED this 20th day of April, 2005.

BENNETT TUELLER JOHNSON & DEERE

/s/_____
Daniel L. Steele
Attorneys for Defendant
Brigham Young University

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2005, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **DEFENDANT BRIGHAM YOUNG UNIVERSITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PSEUDONYM**, to:

R. Willis Orton
Stephen W. Geary
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, Utah 8414

T.G.
General Delivery
Castaic, California 91310

T.G.
General Delivery
Canoga Park, CA 91303

/s/_____
Tina Cutolo